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WORDS LEFT UNSAID

Justice Kennedy's Opinion in *Obergefell v. Hodges* and the Future of LGBT Rights in America

By

Antonia M. Lluberes

Public Policy & Law Honors Thesis

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In Memory of Austin Brandt Graff
1930-2013

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Introduction

Since 1996, Justice Anthony Kennedy has authored the four Supreme Court decisions recognizing the rights and dignity of homosexuals in America. In *Romer v. Evans* (1996),[1] Justice Kennedy struck down a state constitutional amendment barring anti-discrimination laws from covering sexual orientation. In *Lawrence v. Texas* (2003),[2] he struck down state bans on homosexual sodomy. In *United States v. Windsor* (2013),[3] he struck down the Defense of Marriage Act (DOMA), a federal law that defined marriage as a union between a man and a woman. Recently he wrote the majority opinion in *Obergefell v. Hodges,* the 5-4 decision declaring that state bans on same-sex marriage and laws prohibiting the recognition of same-sex marriages legally performed elsewhere were unconstitutional.[4] While Anthony Kennedy will go down in history as the justice who first recognized and then cemented the idea that gays and lesbians deserve equal rights and dignity, he will also be remembered in some circles for what he did not say in his gay rights opinions.

In each of the cases above, Justice Kennedy managed to rule in favor of gay rights without determining the standard of review, or level of scrutiny, for laws that classify persons based on their sexual orientation. While in each of the cases before *Obergefell* there were reasons why Kennedy chose to not determine the standard of review, those in *Obergefell* have frustrated many since the decision came out. This paper seeks to examine Justice Kennedy's gay rights jurisprudence to demonstrate the consistent characteristics of his opinions in *Romer, Lawrence, Windsor,* and finally *Obergefell.* While it is undeniable that his opinions asserted that the

[1] Romer v. Evans, 517 U.S. 620 (1996)
[2] Lawrence v. Texas, 539 U.S. 558 (2003)
[3] United States v. Windsor, No. 12-307 (2013).
[4] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

Constitution guarantees homosexuals equal protection and due process under the law, ultimately his decision to eschew determining the standard of review for sexual orientation has resulted in concrete harm for homosexuals and the rest of the LGBT community.

Justice Kennedy's opinion in *Obergefell* had many undeniably positive aspects, and established that the Fourteenth Amendment afforded same-sex couples equal dignity and the fundamental right to marry. However, in many states gays and lesbians can still be legally fired from their jobs, denied a loan, or denied service in a restaurant simply for being homosexual. While determining the standard of review would not have ended all discrimination on the basis of sexual orientation, it would have given the LGBT community and those defending their rights a concrete tool to use against persons who, especially after *Obergefell,* seek a right to be exempt from issuing marriage licenses or following anti-discrimination laws because of religious objections.

Chapter I will briefly discuss the gay rights movement and how the push for same-sex marriage developed in the twentieth century. Chapter II discusses Justice Kennedy's background as a lawyer and judge on the Ninth Circuit Court of Appeals and on the Supreme Court. Section two of that chapter examines an opinion he wrote in 1980 ultimately ruling against gay rights, while also revealing his progressive attitude towards gay rights and homosexuals as human beings in a legal context. Section three of that chapter outlines Justice Kennedy's gay rights jurisprudence on the Supreme Court, with detailed analysis of his opinions in *Romer, Lawrence,* and *Windsor.* Chapter III outlines *Obergefell v. Hodges* from the case's beginnings with various same-sex couples in four different states, to the decision. Chapter IV outlines and analyzes the arguments of the four dissenting opinions in *Obergefell v. Hodges* and the merits of each. Chapter V discusses and analyzes the criticisms of Kennedy's opinion on the part of those who

agreed with the ultimate outcome but decried the opinion for not determining the standard of review. The concluding chapter will examine the situations that have arisen in light of the lack of a clear standard of review and will conclude with recommending a remedy for the current situation. This paper argues that the Court will eventually have to rule that sexual orientation is a suspect or quasi-suspect class and eventually the federal government will amend anti-discrimination laws to cover sexual orientation and gender identity.

While throughout the paper I discuss the rights of homosexuals and the need for a clear standard determining the level of scrutiny for laws that classify on the basis of sexual orientation, I write with the understanding that should the Court determine the standard, or had Kennedy done so in *Obergefell,* it would protect the LGBT community in a comprehensive sense. Therefore, while at many points of this thesis I discuss the rights and dignity of same-sex marriage, gays, lesbians, and same-sex couples, that discussion is written with the understanding that the arguments I make and the analysis I provide apply with full force to other members of the LGBTQ community. That is not to demean the rights or liberties of persons discriminated against or denied protections based on gender identity, but to make this paper cohesive, it was necessary to be consistent in the language.

Chapter I

The Gay Rights Movement and the Road to Same-Sex Marriage

Gay Rights in America: A Brief Summary

Although the gay rights agenda pursuing marriage equality has taken center stage in recent years, the gay rights movement and the struggle for equality outside of marriage began more than half a century ago. In the 1950s, the American Psychiatric Association considered homosexuality a "sociopathic personality disturbance," and homosexuals were abhorred for their "lifestyle," which was viewed as unclean and immoral by society.[1] This grave misunderstanding of homosexuality created a sense of fear in hetero-normative America that led to the criminalization and oppression of homosexuals. During this time, homosexuals were legally barred from working for the U.S. government or serving in the military if they were open about their sexuality, and homosexual acts were sufficient to deny or revoke licenses to practice medicine, law, or nursing.[2] Even organizations like the American Civil Liberties Union (ACLU) deemed laws condemning homosexual acts constitutional as homosexuals were "socially heretical or deviant."[3] Understandably, many homosexuals hid their sexuality in fear of social persecution, and as a result, there was very little organized activism for the gay rights agenda during this time.

In the 1960s, although every state in America had laws barring even private, consensual, same-sex intimacy,[4] civil libertarians and organizations like the American Law Institute rejected

[1] "Timeline: Milestones in the American Gay Rights Movement," PBS, last modified June 24, 2011, accessed December 11, 2015, http://www.pbs.org/wgbh/americanexperience/features/timeline/stonewall/.
[2] Klarman, *From the Closet to the Altar*, xx and 11.
[3] Ibid., 6
[4] Ibid., 3

the criminal punishment of private sex between consenting adult homosexuals.[5] Simultaneously, American society started to change its perception of previously contentious issues such as divorce, contraception, sexual mores, and the sexual content of mass media.[6] In 1965 the Supreme Court ruled in *Griswold v. Connecticut* that a Connecticut statute criminalizing the distribution of, or medical recommendation of, contraceptives was unconstitutional.[7] Justice William Douglas wrote the majority opinion for the Court and argued that certain rights of privacy concerning the intimate relationships of consenting adults were beyond government control, particularly the right of marriage and marital intimacy.[8] Furthermore, though these rights were not included in the Constitution, Douglas established that certain guarantees within the Bill of Rights include penumbras, or zones, which incorporate unenumerated rights not explicitly stated in the text. Justice Douglas reasoned in *Griswold,* the First, Third, Fourth, Fifth, and Ninth Amendments offer additional protections that went beyond the exact language of the text and created a new constitutional right to privacy in marital relations.

Two years later, the Supreme Court unanimously ruled in *Loving v. Virginia* that state laws banning and criminalizing interracial marriages were unconstitutional.[9] Chief Justice Earl Warren argued that the anti-miscegenation laws violated the fundamental right to marry and constituted invidious racial discrimination under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment.[10] The Court also rejected the notion that equal *application* of a statute containing racial classifications was enough to protect the classification from Fourteenth Amendment review. In other words, the Court did not accept that the statutes could

[5] Ibid., 10
[6] Ibid., 8
[7] Griswold v. Connecticut, 381 U.S. 479 (1965).
[8] Ibid.,
[9] Loving v. Virginia, 388 U.S. 1 (1967).
[10] Ibid., 12

be justified simply because the Virginia law punished blacks and whites equally.[11] The Court also noted it regarded statutes that made distinctions between people because of their ancestry as "odious" and argued they were contradictory to the American doctrine of equality.[12] Perhaps most importantly, the Court made clear that:

> The Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny,'…and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.[13]

Using this strict standard of judicial review, the Court held the state had no compelling overriding purpose other than discrimination to justify the statutes. Regarding the Due Process Clause, the Court held that the laws denied the Lovings' liberty without due process of law and held that "[t]he freedom to marry has long been recognized as one of the vital rights essential to the orderly pursuit of the happiness of free men."[14] In a twelve page opinion, the Court unanimously struck down what was arguably the last form of legal, institutionalized, discrimination against blacks in America.

Though *Griswold* and *Loving* were steps in the right direction for marriage equality, there still was no significant organization or push for same-sex *marriage* within the gay rights movement itself. In the 1950s, homophile organizations like the Mattachine Society started merely *discussing* "marriage-like" relationships, and the Daughters of Bilitis did not see marriage as a priority.[15] Other activists were more vocal about their opposition to marriage as an

[11] Ibid., 8
[12] Hirabayahi v. United States, 320 U.S. 81, 100 (1943) cited in Loving v. Virginia, 388 U.S. 1, 11 (1967).
[13] Loving v. Virginia, 388 U.S. 1, 11 (1967) citing Korematsu v. United States, 323 U.S. 214, 216 (1944)
[14] Loving v. Virginia, 388 U.S. 1, 12 (1967).
[15] Suzanne Sherman, introduction to *Lesbian and Gay Marriage: Private Commitments, Public Ceremonies* (Philadelphia: Temple University Press, 1992), 6.

oppressive, sexist, and inherently heterosexual institution that should not be pursued.[16] Marriage, they argued, should be weakened and repealed by an alternative that allowed all people, homosexuals and heterosexuals alike, to develop their own understandings of love and family.[17] These advocates argued that the twofold purpose of the gay rights movement was for the affirmation of gay identity in American society and the validation and acceptance of intimate, committed relationships other than marriage.[18] According to them, the legalization of same-sex marriage encouraged gays to assimilate with hetero-normative society *and* strengthened the oppressive institution of marriage -- both of which undermined the main goals of the movement.

One such critic was Paula Ettelbrick, former lawyer of Lambda Legal,[19] who argued that the legalization of same-sex marriage would make the homosexual community "invisible" as homosexual married couples joined the mainstream.[20] Ettelbrick argued that homosexuals in America were proud of their differences from heterosexuals and subsequently wanted to be recognized and accepted by society considering those differences. Furthermore, society's disqualification of marriage as the pinnacle of commitment and acceptance -- not the right to *marry* -- would give gays and lesbians justice and full recognition of their relationships.[21] Therefore, by arguing for equal treatment under the law and fighting to enter into the institution of marriage, homosexuals must accept all of its oppressive characteristics and have their

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[16] Andrew Sullivan, *Same-sex Marriage, Pro and Con: A Reader* (New York: Vintage Books, 1997), 117; Joyce Murdoch and Deb Price, *Courting Justice: Gay Men and Lesbians v. The Supreme Court* (New York: Basic Books, 2001), 168; David L. Chambers, "Couples: Marriage, Civil Union, and Domestic Partnership," in *Creating Change: Sexuality, Public Policy, and Civil Rights*, by John D'Emilio, William B. Turner, and Urvashi Vaid (New York: St. Martin's Press, 2000), 282.

[17] Sullivan, *Same-sex Marriage, Pro and Con*, 117; Murdoch and Price, *Courting Justice: Gay Men and Lesbians*, 168.

[18] Paula L. Ettelbrick, "Since When Is Marriage a Path to Liberation?," in *Lesbian and Gay Marriage: Private Commitments, Public Ceremonies*, ed. Suzanne Sherman (Philadelphia: Temple University Press, 1992), 21 .

[19] "Who We Are," Lambda Legal, accessed February 6, 2016, http://www.lambdalegal.org/about-us. (Lambda Legal is the oldest and largest national organization whose mission is to achieve full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact legislation, education, and public policy work.)

[20] Ettelbrick, "Since When Is Marriage," in *Lesbian and Gay Marriage*, 21.

[21] Ibid., 22

relationships regulated by the state.[22] In other words, if same-sex couples were allowed to marry, society may look upon same-sex couples that choose *not* to marry with disdain just as society does for heterosexual couples who choose not to marry.[23] To Ettelbrick, the agenda of the gay rights movement was simple:

> Until the Constitution is interpreted to respect and encourage differences, pursuing the legalization of same-sex marriage would be leading our movement into a trap; we would be demanding access to the very institution that, in its current form, would undermine our movement to recognize many different kinds of relationships.[24]

This is not to say that opponents of same-sex marriage within the gay rights movement did not understand why some same-sex couples would *want* to seek marriage. To this point, Ettelbrick notes, "[m]arriage provides the ultimate form of acceptance for personal, intimate relationships in our society, and gives those who marry an insider status of the most powerful kind."[25] Given the importance society gives to marriage, it therefore was not surprising that some same-sex couples wanted to enter into the institution and become insiders.[26] However, Ettelbrick also recognized that this right would not be for the homosexual community as a whole; rather, it would be sought by couples who are closer to the "norm" of society with their race, gender, and economic status because:[27]

> The law looks to the insiders as the norm, regardless of how flawed or unjust their institutions, and requires that those seeking the law's equal protection situate themselves in a similar posture to those who are already protected. In arguing for the right to legal marriage, lesbian and gay men would be forced to claim that we are just like heterosexual couples, have the same goals and purposes and vow to structure our lives similarly. The law provides no room to argue that we are different but are nonetheless entitled to equal protection.[28]

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[22] Ibid., 21
[23] Ibid., 22
[24] Ibid., 23
[25] Ibid., 20-21
[26] Ibid., 20-21
[27] Ibid., 24
[28] Ibid., 23

In contrast to this view, there were some within the gay rights movement who thought marriage should be the center, or at least considered part, of the gay rights agenda. Even activists like Thomas Stoddard -- who worked with Ettelbrick at Lambda, and served as its executive director from 1986 to 1992, who viewed marriage as oppressive, and who did not want to seek marriage for himself -- saw value in marriage.[29] He argued there were compelling practical, political, and philosophical reasons why every homosexual should have the right to marry the person of their choice, and why the gay rights movement should aggressively seek legal recognition of same-sex marriage.[30] In a practical sense, there are immense economic advantages to marriage. These include: inheriting from your spouse if there is no will; ensuring a surviving spouse receives social security benefits; obtaining citizenship for one's foreign-born spouse; and immunity from subpoenas requiring testimony against one's spouse.[31] Additionally, outside of the legal spectrum, many employers provide health insurance and inclusion in employee benefits packages.

Politically, the legalization of same-sex marriage would do the most to test the dedication of married heterosexuals to full gay equality, and would push society towards ending discrimination against homosexuals in America.[32] Homosexuals also began to realize how attaching same-sex couples to love, an emotion strongly associated with marriage, helped to ease homophobic notions and made homosexuals appear more like heterosexuals.[33] However,

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[29] David W. Dunlap, "Thomas Stoddard, 48, Dies; An Advocate of Gay Rights," The New York Times, last modified February 14, 1997, accessed February 6, 2016, http://www.nytimes.com/1997/02/14/nyregion/thomas-stoddard-48-dies-an-advocate-of-gay-rights.html.

[30] Thomas B. Stoddard, "Why Gay People Should Seek the Right to Marry," in *Lesbian and Gay Marriage: Private Commitments, Public Ceremonies*, ed. Suzanne Sherman (Philadelphia: Temple University Press, 1992), 14.

[31] Ibid., 15; Michael J. Rosenfeld, *The Age of Independence: Interracial Unions, Same-sex Unions, and the Changing American Family* (Cambridge, Mass.: Harvard University Press, 2007), 174.

[32] Stoddard, "Why Gay People Should," in *Lesbian and Gay Marriage*, 17.

[33] John D'Emilio, "Will the Courts Set Us Free? Reflections on the Campaign for Same-Sex Marriage," in *The Politics of Same-sex Marriage*, ed. Craig A. Rimmerman and Clyde Wilcox (Chicago: University of Chicago Press, 2007), 41-42.

activists did not believe that marriage was the quick fix for homophobia, and they understood the legalization of same-sex marriage would not eradicate opposition to homosexuality, just as the *Loving* decision did not eradicate racism or opposition to interracial marriage.[34] Despite this reality, however, Stoddard noted:

> *Griswold* called marriage a "noble" and "sacred" institution and homosexuals have been denied entry into it. The implicit message is this: two men or two women are incapable of achieving such an exalted domestic state. Gay relationships are somehow less significant, less valuable. Such relationships, may, from time to time and couple to couple give the appearance of marriage, but they can never be of the same quality or importance.[35]

Philosophically, Stoddard recognized that abolishing marriage as the cornerstone of relationships in America was rather unlikely, however, opening the institution of marriage to same-sex couples would "necessarily transform it into something new."[36] Furthermore he framed the issue as homosexuals desiring the *right* to marry not necessarily desiring *to* marry.[37]

While the arguments for marriage were beginning to surface in some circles, the overall consensus within the movement was that there were other, more important aspects of gay equality in America to focus on first. During this time gay rights organizations began to attract more members and more progressive wings of the movement began calling for equal rights and direct action. These progressives rejected the earlier generations' desire to assimilate, educate the public, and let social scientists address the rights and treatments of homosexuals in America.[38] These "progressive" gay rights activists began to pursue legal action and had some success in challenging the closing of gay bars and dismissal of homosexual service members.[39] One of the hallmark events of this period was the 1969 Stonewall Inn Rebellion in Greenwich Village where

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[34] Rosenfeld, *The Age of Independence*, 189.
[35] Stoddard, "Why Gay People Should," in *Lesbian and Gay Marriage*, 18.
[36] Ibid., 19.
[37] Ibid., 18.
[38] Klarman, *From the Closet to the Altar*, 11.
[39] Ibid., 12

police raided the gay bar and patrons fought back in self defense. This was the "shot heard 'round the world" for the gay rights movement and set in motion a series of events that catalyzed significant constitutional changes in America.[40]

A Call for Marriage: *Baker v. Nelson* and Beyond

Although the legalization of same-sex marriage was not at the forefront of the gay rights movement, there were murmurs from certain gay rights groups and same-sex couples who saw the validation of their relationships as the centerpiece of their push for gay equality. One such couple was Mike McConnell and Jack Baker, a Minnesota couple who first brought the question of same-sex marriage to the Supreme Court.

At a Halloween party in 1966, McConnell and Baker met and fell in love.[41] In 1971 they filed for a marriage license in Minnesota, their application was denied, and they subsequently filed suit against the Hennepin County District Clerk.[42] The plaintiffs argued that the Minnesota marriage statute did not expressly prohibit same-sex marriage and therefore their marriage should be authorized. Interpreting the state statute to allow only heterosexual marriage was unconstitutional under the Ninth Amendment, which states that rights not explicitly granted by the Constitution are not necessarily denied to them. Furthermore, they argued restricting marriage to heterosexual couples denied them due process and equal protection under the Fourteenth Amendment and constituted irrational and invidious discrimination. Lastly, as established in *Griswold* and *Loving,* they argued the government could not impede on the intimacy of two consenting adults, and that the Constitution guaranteed the right to marry the

[40] Ibid., 17-18
[41] Joyce Murdoch and Deb Price, *Courting Justice: Gay Men and Lesbians v. the Supreme Court* (New York: Basic Books, 2001), 164.
[42] Baker v. Nelson, 191 N.W.2d 185, (Minn. Supreme Court 1971).

person of one's choosing.[43] Despite these arguments, they lost their case in the Minnesota trial court and appealed the decision to the Minnesota Supreme Court.[44]

On October 15, 1971 the Minnesota Supreme Court ruled in *Baker v. Nelson* that there was no constitutional violation in denying Baker and McConnell a marriage license, and that restricting marriage to opposite sex couples was neither irrational nor proof of invidious discrimination.[45] In other words, the court rejected the applicability of *Loving*, arguing there was a clear distinction between a marital restriction based on race and one based on sex.[46] The *Loving* decision, therefore, did not imply that *all* restrictions on marriage were in violation of the Fourteenth Amendment, just restrictions that were created to discriminate. Furthermore, the court held that states were able to control marital eligibility and *Griswold* applied only to heterosexual relationships. The court also focused on the link between marriage and procreation, citing the Book of Genesis to reason on biological grounds that marriage should be restricted to a man and a woman.[47]

The petitioners appealed this ruling to the United States Supreme Court, which then dismissed the case on the merits in 1972, stating that it did not present a substantial federal question.[48] With the Supreme Court's one line dismissal, the *Baker* decision in the Minnesota Supreme Court was binding. Though the ruling was a blow to same-sex marriage, it also marked a turning point in the gay rights movement because gay activists began to raise other issues

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[43] Ibid.,
[44] David L. Chambers, "Couples: Marriage, Civil Union, and Domestic Partnership," in *Creating Change: Sexuality, Public Policy, and Civil Rights*, by John D'Emilio, William B. Turner, and Urvashi Vaid (New York: St. Martin's Press, 2000), 284.
[45] Baker v. Nelson, 191 N.W.2d 185, (Minn. Supreme Court 1971).
[46] Ibid.,
[47] Ibid., ("The institution of marriage as a union of a man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis").
[48] Baker v. Nelson, 409 U.S. 810 (1972) ("Appeal from Sup. Ct. Minn. Dismissed for want of substantial federal question").

concerning LGBT rights such as sodomy laws, bans on openly serving in the military, homophobic violence, and discrimination in employment, housing, and healthcare.[49]

In the 1970s about half of the states repealed their sodomy laws and by 1973 the American Psychiatric Association had removed homosexuality from its list of mental illnesses.[50] In 1975 the U.S. Civil Service Commission lifted its ban on employing homosexuals, and several localities began to bar discrimination based on sexual orientation.[51] Despite these gains, efforts to revoke the bans on homosexuals serving in the military failed, and courts tended to reject challenges to the policy.[52] Additionally, in cases brought regarding same-sex marriage in some states, courts rejected any legal argument for gay marriage and argued, similarly to *Baker,* that although many states did not define marriage between a man and a woman, the legislature intended to preserve that traditional understanding in the creation of its laws.[53] However, there were some progressive judges who were becoming more supportive of the idea, and some even spoke of gays as a group entitled to special judicial protection because, as a group, they were historically disadvantaged and still suffering from invidious discrimination.[54]

The AIDS epidemic of the 1980s marked a tangible shift in the gay rights movement that slowly galvanized homosexuals to seek legal recognition of their relationships. Within the gay community, AIDS forced closeted homosexuals to come out about their sexuality, which in turn

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[49] Klarman, *From the Closet to the Altar*, 48; D'Emilio, "Will the Courts Set Us Free?," in *The Politics of Same-sex*, 40-41.
[50] Klarman, *From the Closet to the Altar*, 13 and 23.
[51] Ibid., 23
[52] Ibid., 30
[53] Andrew Sullivan, *Same-sex Marriage, Pro and Con: A Reader* (New York: Vintage Books, 1997), 96; Klarman, *From the Closet to the Altar*, 19. See Jones v. Hallahan 501 S.W.2d 588 (1973) (Kentucky Court of Appeals argued that marriage "has always been considered as the union of a man and a woman and we have been presented with no authority to the contrary"); Singer v. Hara, 522 P.2d 1187, 11 Wash. App. 247, 84 Wash. 2d 1008 (Ct. App. 1974)(Washington Court of Appeals held that not allowing same-sex couples to marry was not sex discrimination because child rearing is essential to marriage rights)).
[54] Klarman, *From the Closet to the Altar*, 41 footnote 137. (NGTF v. Bd. of Educ. of Oklahoma City, 729 F.2d 1270 (10th Cir. 1984); Watkins v. United States Army, 847 F.2d 1329 (9th Cir. 1988); High Tech Gays v. Def. Indus. Sec. Clearance Office, 668 F. Supp. 1361, 1368 (N.D. Cal. 1987)).

made people see gays not as criminals and pedophiles, but as friends, family, and colleagues. Additionally, the epidemic revealed the vulnerability of same-sex relationships, as many homosexuals who lost partners to AIDS had little to no protections or rights when their partner was ill in the hospital, or after they had passed away from the disease.[55] Additionally, many gay men faced hardships gaining access to medical insurance to pay for the expensive treatments, medications, and hospital visits since many employers offered coverage to spouses of employees, but not to a worker's unmarried partner.[56] Perhaps most importantly, more homosexuals who previously did not view their relationships as a fundamentally important aspect of their life began to see them in a new light while caring for ill partners who were infected with the AIDS virus.[57]

In the 1980s, the number of gay men who became involved in political efforts grew substantially because their lives were affected by AIDS, and many of them sought a more active and responsive role from the state.[58] In San Francisco particularly, the push for legalizing domestic partnerships and putting more funds towards AIDS research and awareness gained support. This change was partly due to the work of Harry Britt, an openly gay member of the San Francisco Board of Supervisors and its future president, who proposed domestic partnership legislation in 1982 only to have it vetoed by then Mayor Diane Feinstein.[59] In 1989 a domestic partnership ordinance was adopted by the Board of Supervisors, rejected by voters, proposed

[55] Ibid., 39; D'Emilio, "Will the Courts Set Us Free?," in *The Politics of Same-sex*, 49. ("Many [gay men] faced situations where the phrase 'next of kin' came into play: hospital visitation rights; decision making about medical care; choices about funeral arrangements and burials; the access of survivors to homes, possessions, and inheritance").
[56] David L. Chambers, "Tale of Two Cities: AIDS and the Legal Recognition of Domestic Partnerships in San Francisco and New York," *Law and Sexuality* 2 (1992): 184.
[57] Ibid.,
[58] Ibid.,
[59] Ibid., 183 (Britt also tried again in 1983, but Feinstein threatened to veto and the legislation was withdrawn)

again, and finally adopted in 1991.[60] By that time, HIV had killed 4,000 gay men in San Francisco and had infected tens of thousands.[61]

At the time of its passage, domestic partnership legislation was not a new issue, but AIDS helped determine what issues people would be politically involved in. More specifically, according to Chambers, "AIDS seems to have affected both the timing of the legal activity and the language and tactics of both proponents and opponents" of domestic partnerships and same-sex marriage.[62] Even some lesbians who were previously campaigning against legislation for the validation of same sex relationships by the city changed their views. For example, Jean Harris, who worked as a lesbian activist and was Harry Britt's assistant in 1989, observed, "AIDS made us realize that our lovers are our support systems. It made us more aware of the importance of primary relationships. It made love and relationships even more important than they had seemed before."[63]

AIDS not only galvanized the effort to pass domestic partnership legislation within the gay community, but also brought the realities of AIDS to the forefront of the city's political agenda. For example, there were significant efforts to persuade California lawmakers to authorize more funds for AIDS research and treatment, and to end the push for legislation requiring mandatory testing of persons believed likely to be infected.[64] Additionally, with government inaction, gay activists started a variety of grassroots organizations to assist people infected with AIDS.[65] Organizations like the San Francisco AIDS foundation and the AIDS Project Los Angeles worked to mobilize thousands of gay volunteers to serve as "buddies" to

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[60] Ibid.,
[61] Ibid.,
[62] Ibid., 181
[63] Interview with Jean Harris, Assistant to Harry Britt, President, San Francisco Board of Supervisors, in San Francisco, Cal. (May 31, 1990), cited in Ibid., 184
[64] Chambers, "Tale of Two Cities," 184.
[65] George Chauncey, *Why Marriage?: The History Shaping Today's Debate over Gay Equality* (New York: Basic Books, 2004), 41-42.

cook meals for, and clean homes of AIDS patients, and intervene when doctors and other medical professionals were afraid to touch or interact with those infected.[66]

Given the severity of the crisis, AIDS acted as a springboard to gay marriage for some. However, there was still no consensus within the gay community on whether marriage should be pursued, and if so how aggressively. The arguments for and against gay marriage within the gay movement remained largely unchanged. Opponents still argued that enabling gays to marry would make gay couples the same as heterosexuals and inevitably stigmatize homosexuals who chose not to marry. Additionally, some activists worried that pursuing gay marriage was to privilege the concerns of middle class gays and divert focus from interests of those less privileged gays for whom marriage was possibly less relevant.[67] Furthermore, outside of the gay community, AIDS only strengthened some people's negative view of homosexuals and motivated their effort to deny gays validation of their relationships. For example, advertising campaigns used to "encourage gay men to use condoms simply reminded some people not of lives that might be saved but of conduct they considered immoral."[68] Furthermore, there was still a sense of indifference nationally towards AIDS: President Reagan did not say the word "AIDS" publicly until 1985 when his friend, actor Rock Hudson, was diagnosed, and he did not give a speech on the issue until 1991 after 20,000 Americans had died from the disease.[69]

In response, pro-gay marriage activists argued that marriage was the centerpiece of American society's social structure and no other political issue would test the dedication of heterosexuals to gay equality.[70] Additionally, they argued that until gays had the same rights as heterosexual couples, homosexuality would remain a second class status. Lastly, they argued that

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[66] Ibid., 42
[67] Ettelbrick, "Since When Is Marriage," in *Lesbian and Gay Marriage*, 24.
[68] Chambers, "Couples: Marriage, Civil Union," in *Creating Change: Sexuality, Public*, 185.
[69] Chauncey, *Why Marriage?: The History*, 41.
[70] Stoddard, "Why Gay People Should," in *Lesbian and Gay Marriage*, 17.

without the right to marry, same-sex couples would need funds to hire lawyers to gain protection, and couples without the means to retain a lawyer would have difficulty securing their relationship rights.[71] Therefore, legalizing same-sex marriage would give all same-sex couples the right to marry, not just well-off couples who could afford legal counsel.[72] Ultimately, the organizational push for same-sex marriage garnered more support and slowly progress began to be made in the validation of same-sex relationships.

By the 1990s, the gay rights movement had made significant progress in the courts for the gay rights agenda and most gay activists showed greater concern for securing equal rights in employment, housing, and health care.[73] By 1993, about twenty-five cities across the country, including New York, Berkeley, West Hollywood, and Madison, had enacted domestic partnership ordinances that entitled partners to health insurance, hospital visitation rights, leave to take care of a sick partner, and other legal benefits.[74] There were small enclaves, usually in liberal urban areas, where gay activists achieved tangible results; however, most of America remained opposed to gay rights. In all of these cities, however, the domestic partnership status and the benefits it entailed only covered municipal employees of the city. Despite their limitations, domestic partnerships started to get the attention of young gay individuals, who tended to be more supportive of same-sex marriage than older generations.[75] Simultaneously, there was a societal change in the understanding of marriage to be more about a commitment to another individual rather than procreation.[76] This change helped support the campaign to allow

[71] Ibid., 16
[72] Ibid.,
[73] Klarman, *From the Closet to the Altar*, 48.
[74] Ibid., 45
[75] Ibid., 11
[76] Ibid., 49

same-sex couples to adopt children, which in turn made the denial of marriage rights much more difficult to defend.[77]

Though these changes may seem like small steps to full equality for homosexuals in America, they do show the strong relationship between gay rights activism and concrete legal change. Activists did not wake up one day and decide they wanted to marry their partners; rather, there was debate, often hotly contested, that for years split the movement between those wanting to seek recognition of their relationships and those who did not. The issue was not black and white and both sides recognized the value of the other's argument. There were many societal, political, and legal implications and considerations the movement needed to make in deciding to move forward with pursuing same-sex marriage.

Starting in the 1990s, at least a few judges in states like Hawaii and Alaska were willing to look seriously at the issue of same-sex marriage, despite the opposition of a majority of Americans at the time.[78] Though the first legalization did not take place until 1993 in Hawaii,[79] during this time the social arguments and the constitutional arguments for and against same-sex marriage, which will be discussed in chapter three, were articulated and have remained mostly unchanged in the last two decades.

[77] Ibid., 51
[78] Ibid., xxi
[79] See footnote 106 in Chapter 2 of this thesis.

CHAPTER II

Justice Kennedy's Jurisprudence and the Road to Same-Sex Marriage

Justice Kennedy and Levels of Scrutiny

To fully understand the *Obergefell v. Hodges* decision, it is important to analyze the steps the litigants took to achieve that result. While there were several cases that the Supreme Court chose not to hear, of those granted certiorari, four most affected the Court's answer to the same-sex marriage question: *Bowers v. Hardwick, Romer v. Evans, Lawrence v. Texas,* and *United States v. Windsor.*[1] While *Bowers* was the first case heard by the Court and ultimately served a major loss for the gay rights movement, the latter three set the stage for *Obergefell* and the recognition of gay rights in America.

Other than affirming the rights of homosexuals, the three cases leading up to *Obergefell* are also linked because they were all written by Justice Anthony Kennedy. Known as the swing vote on the Court today, Kennedy's opinions in *Romer* and *Lawrence* paved the way for his reasoning in *Windsor* and *Obergefell,* particularly regarding his application of the Fourteenth Amendment's Due Process and Equal Protection Clauses to gay rights issues. Though only *Windsor* dealt specifically with the issue of same-sex marriage, *Romer* and *Lawrence* also provide a substantial rationale for Kennedy's opinion in *Obergefell.*

One point of controversy in Justice Kennedy's jurisprudence on gay rights, however, is his eschewal of assigning the level of scrutiny the Court should apply when determining the constitutionality of laws that single out homosexuals. Currently there are three levels of review,

[1] Bowers v. Hardwick, 478 U.S. 186, (1986). (In this case the Court upheld Georgia's sodomy laws, reasoning that homosexuals did not have a right to same sex sodomy); Romer v. Evans, 517 U.S. 620, (1996); Lawrence v. Texas, 539 U.S. 558, (2003); United States v. Windsor, No. 12-307, slip op. 1 (2013).

or scrutiny, the Court can use when considering a law that targets, or "classifies," a specific group of people: strict, heightened, or rational basis. Laws that classify based on race, national origin, or religion (known as suspect classes)[2] are subject to strict scrutiny, and are assumed to be unconstitutional unless the state offers a very good reason for the classification.[3] Laws that classify according to gender (a semi-suspect class)[4] are subject to heightened scrutiny and can be upheld for some reasons (i.e. some physical characteristics in certain employment situations), but not many. Laws that classify on age, social class, or other *non-suspect* classes are subject to the rational basis test and only need a plausible reason to be upheld. While laws that undergo strict or heightened scrutiny are rarely upheld as constitutional, laws subject to the rational basis test are much more likely to pass the Court's standard.

Determining the standard of review is important because the more rigorous the scrutiny, the more difficult it is for the government to defend a law. Particularly in cases involving the Fourteenth Amendment, the pre-determined standard nearly ensures that laws classifying people based on race or gender, for example, are rarely upheld. While these classifications have proven beneficial for racial minorities and women, homosexuals have never received the same level of certainty from the Court. As the author of all four Supreme Court decisions over a nineteen-year period that expanded and recognized homosexual rights, Justice Kennedy arguably had ample

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[2] Generally, the Court defines a suspect class as a group that has suffered a history of discrimination; they exhibit an obvious, immutable, or distinguishing characteristic; and is a minority with less political power than non-suspect classes. See Brett Parker, "What Level of Legal Scrutiny Should Sexual Orientation-Based Classifications Receive?," The Stanford Political Journal, last modified January 19, 2015, accessed October 30, 2015, http://stanfordpolitics.com/2015/01/what-level-of-legal-scrutiny-should-sexual-orientation-based-classifications-receive/.

[3] Laws that restrict a fundamental right are also subject to strict scrutiny. See Garrett Epps, "Gay Marriage Gets Its Day in Court," The Atlantic, last modified April 27, 2015, accessed February 21, 2016, http://www.theatlantic.com/politics/archive/2015/04/gay-marriage-gets-its-day-in-court/391487/.

[4] The Court defines a quasi or semi-suspect class as one that has suffered from a history of discrimination; exhibits an obvious, distinguishable, or immutable characteristic; but is not a minority or politically powerless. See Parker, "What Level of Legal," The Stanford Political Journal.

time and opportunity to determine what level of review laws targeting homosexuals should receive, but chose not to do so.

Justice Kennedy: A Classic Pragmatist

Anthony McLeod Kennedy was born July 23, 1936 in Sacramento, California to Anthony J. Kennedy, an attorney and lobbyist, and Gladys Kennedy, a teacher.[5] Growing up, Kennedy took an interest in politics and was a star student; he attended Stanford University and finished his requirements in three years before spending his fourth year at the London School of Economics.[6] Kennedy then attended Harvard Law School, and after graduating in 1961 he returned to his hometown to teach at McGeorge Law School and take over his father's law firm.[7] While practicing law and teaching, Kennedy also worked as a lobbyist for the Republican Party in California and became an acquaintance of Edwin Meese, who would later become a top aide to then Governor Ronald Reagan.

In 1975 Ronald Reagan recommended the President Gerald Ford appoint Kennedy to a seat on the U.S. Court of Appeals for the Ninth Circuit, who then nominated Kennedy for the seat. At 38, Kennedy was the youngest federal appellate judge in the country. During his time on the Ninth Circuit, Kennedy took a narrow case-by-case approach in his opinions and did not appear to be influenced by ideological principles or rhetoric.[8] Despite the ideological differences between him and the other more progressive judges on the Ninth Circuit, Kennedy had a polite demeanor that kept negotiations cordial when the Court was divided. During this time as the Ninth Circuit's minority leader, he earned a positive reputation amongst lawyers and judges.[9]

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[5] Chicago-Kent College of Law at Illinois Tech, "Anthony M. Kennedy," Oyez, accessed February 21, 2016, https://www.oyez.org/justices/anthony_m_kennedy.
[6] Ibid., and Jeffrey Toobin, *The Oath: The Obama White House and the Supreme Court* (New York: Doubleday, 2012), 51.
[7] Toobin, *The Oath: The Obama*, 51.
[8] Chicago-Kent College of Law at Illinois Tech, "Anthony M. Kennedy," Oyez.
[9] Ibid.,

While on the Ninth Circuit, Kennedy wrote an important gay rights opinion, *Beller v. Middendorf.*[10] The case dealt with the constitutionality of the U.S. Navy rule that prohibited enlisted members from engaging in homosexual acts.[11] While Kennedy's opinion ultimately upheld the Navy's regulations as constitutional, his reasoning was quite significant given the time and arguably it foreshadowed his later opinions on gay rights.

In his opinion, Kennedy stated that "the real stigma imposed by the Navy's actions . . .is the charge of homosexuality," but because the plaintiffs did not charge that the Navy's policies discriminated against homosexuals, the court did not have to determine the regulation's constitutionality in that context.[12] Additionally, regarding substantive due process,[13] Kennedy argued that the narrow question of the case did not require the court to determine whether consensual private homosexual conduct was a fundamental right.[14] In addition, since the plaintiffs only argued that the regulations violated their fundamental right to *privacy*, and *Beller* dealt narrowly with a Naval regulation prohibiting homosexual conduct, the equal protection analysis was not required.[15] In other words, had the plaintiffs argued that the regulations discriminated against *homosexuals*, or if the case dealt with criminalization of private consensual

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[10] Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980). (The *Beller* case consolidated the cases of three enlisted members who, with otherwise pristine performance records, admitted to engaging in homosexual conduct. After each case was heard before an administrative discharge board and reviewed by the Secretary of the Navy, each plaintiff in the case was discharged. The plaintiffs brought suit, arguing that the Navy's regulations and challenges were unconstitutional under the due process clause and equal protection clause of the Fourteenth Amendment).

[11] Ibid., citing Inst 1900.9A. ("Members involved in homosexuality are military liabilities who cannot be tolerated in a military organization. In developing and documenting cases involving homosexual conduct, commanding officers should be keenly aware that members involved in homosexual acts are security and reliability risks who discredit themselves and the naval service by their homosexual conduct. Their prompt separation is essential").

[12] Beller v. Middendorf, 632 F.2d 788, 806 (9th Cir. 1980).

[13] Substantive due process prohibits the government from infringing on *fundamental* constitutional liberties. For example, marriage is a fundamental right under the constitution and the state cannot deny or limit marriage without a compelling reason.

[14] Beller v. Middendorf, 632 F.2d 788, 807 (9th Cir. 1980). (Kennedy noted that *if* the Ninth Circuit determined that it was a fundamental right, then the Court would have to apply strict scrutiny to the Navy's regulations, and the Navy would have to offer a compelling reason for barring open homosexuals from serving).

[15] Ibid., ("These appeals were not presented to us as implicating a suspect or quasi-suspect classification. The attacks, rather, were based on the claim that the conduct prohibited by the regulation was protected as an aspect of the fundamental right of privacy. Substantive due process, not equal protection, was the basis of the constitutional claim, and we address the case in those terms").

homosexual conduct outside of the military, Kennedy suggested the court might have applied equal protection analysis.

Therefore, Kennedy argued that there only had to be a *rational* reason for the Navy to bar and discharge open homosexuals from the service, and the Navy's reasons were sufficient.[16] However, Kennedy noted that just because the court upheld the regulations as constitutional did not mean the regulations were wise. On the contrary, the judgment did not indicate the court's view on the morality of the regulations since it was not within the power of the court to determine.[17]

Kennedy's opinion in *Beller v. Middendorf* is important for three reasons. First, it demonstrated Kennedy's tendency to write narrow opinions answering only the question at hand. Second, it showed that Kennedy emphasized individual rights in his analysis. Finally, his focus on discrimination laid the groundwork for his opinions regarding gay rights in the Supreme Court. However, the case also presented a breakthrough because it was the first time a federal appeals court suggested that government discrimination against gay people (outside the military) might have to pass "heightened scrutiny" to be constitutional.[18]

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[16] Ibid., 810-811 ("While it is clear that one does not surrender his or her constitutional rights upon entering the military, the Supreme Court has repeatedly held that constitutional rights must be viewed in light of the special circumstances and needs of the armed forces. . . There are multiple grounds for the Navy to deem this regulation appropriate for the full and efficient accomplishment of its mission. The Navy can act to protect the fabric of military life, to preserve the integrity of the recruiting process, to maintain the discipline of personnel in active service, and to insure the acceptance of men and women in the military, who are sometimes stationed in foreign countries with cultures different from our own. The Navy, moreover, could conclude rationally that toleration of homosexual conduct, as expressed in a less broad prohibition, might be understood as tacit approval").

[17] Ibid., 812 ("Upholding the challenged regulations as constitutional is distinct from a statement that they are wise. The latter judgment is neither implicit in our decision nor within our province to make").

[18] See Joyce Murdoch and Deb Price, *Courting Justice: Gay Men and Lesbians v. the Supreme Court (*New York: Basic Books, 2001), 210. Citing Arthur Leonard.

The Big Leagues: Justice Kennedy and the Supreme Court

On June 27, 1987, Justice Lewis Powell surprised Washington and the White House when he announced his resignation from the U.S. Supreme Court after serving for 16 years.[19] Despite Democratic warnings, President Reagan nominated Robert Bork a few days later to fill the vacancy.[20] After an arduous battle, the Senate finally voted on October 23, 1987 to block Bork's appointment 42-58.[21]

A few weeks later, President Reagan nominated Kennedy for the seat. Justice Kennedy's confirmation hearings began in December 1988, an election year, and in February he was unanimously approved by the Senate 97-0 and sworn in.[22] Much as he did on the Ninth Circuit, Kennedy took a pragmatic approach to the cases heard by the Court. Though he voted with the conservatives on the Court for the first few years, he rocked the boat in 1992 when he co-authored the opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey.*[23] Then, four years later, the Court voted to hear its first gay rights case since *Bowers v. Hardwick.*[24]

Roy Romer v. Richard G. Evans

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[19] Chicago-Kent College of Law at Illinois Tech, "Lewis F. Powell Jr.," Oyez, accessed February 21, 2016, https://www.oyez.org/justices/lewis_f_powell_jr.

[20] Jonathan Fuerbringer, "Byrd Says Bork Nomination Would Face Senate Trouble," *The New York Times* (New York, NY), June 30, 1987, accessed February 21, 2016, http://www.nytimes.com/1987/06/30/us/byrd-says-bork-nomination-would-face-senate-trouble.html. (Bork was unanimously known as a staunch conservative with a crass personality and had been involved in the Watergate Scandals as Solicitor General).

[21] Associated Press, "Senate's Roll-Call on the Bork Vote," *The New York Times* (New York, NY), October 24, 1987, accessed February 21, 2016, http://www.nytimes.com/1987/10/24/us/senate-s-roll-call-on-the-bork-vote.html.

[22] Linda Greenhouse, "Washington Talk: Court Politics; Nursing the Wounds from the Bork Fight," *The New York Times* (New York, NY), November 30, 1987, [Page #], accessed February 21, 2016, http://www.nytimes.com/1987/11/30/us/washington-talk-court-politics-nursing-the-wounds-from-the-bork-fight.html.

[23] Planned Parenthood of Southeastern PA v. Casey, 505 U.S. 833 (1992). (5-to-4 decision, reaffirming Roe v. Wade).

[24] (Interestingly, Justice Powell, whom Kennedy replaced, voted to uphold the Georgia laws criminalizing homosexual conduct and later admitted he regretted the decision). See Michael J. Rosenfeld, *The Age of Independence: Interracial Unions, Same-sex Unions, and the Changing American Family* (Cambridge, Mass.: Harvard University Press, 2007), 165.

In 1992 the state of Colorado placed a constitutional amendment on the ballot for a referendum vote. Known as Amendment 2, it sought to remove all anti-discrimination protections for homosexuals in the state that currently existed, and barred them from being reinstated in the future:

> No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt, or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian, or bisexual orientation, conduct or practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.[25]

Almost immediately after voters approved Amendment 2, plaintiffs filed suit hoping they could stop it from ever taking effect. A district court judge issued a temporary order barring Amendment 2 from becoming part of the state constitution, arguing that the government needed a compelling interest to implement it.[26] In response, the state Attorney General appealed to the Colorado Supreme Court, which upheld the district court's preliminary injunction, though on different grounds.[27] In the 6-1 opinion, the Colorado Supreme Court ruled:

> The Equal Protection Clause of the United States Constitution protects the fundamental right to participate equally in the political process, and that any legislation or state constitutional amendment which infringes on this right by 'fencing out' an independently identifiable class of persons must be subject to strict judicial scrutiny.[28]

After this ruling, the case went back to the district court, where the state had to prove Amendment 2 was narrowly tailored to meet a compelling state interest.[29] The district court found that Amendment 2 was not narrowly tailored to serve any interest the state provided. The

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[25] Colorado Constitution., Article II §30b. Cited in Romer v. Evans, 517 U.S. 620, 624 (1996).
[26] Murdoch and Price, *Courting Justice: Gay Men and Lesbians*, 457.
[27] Evans v. Romer, 854 P.2d 1270 (Colo. 1993) (Evans I)
[28] Murdoch and Price, *Courting Justice: Gay Men and Lesbians*, 457.
[29] Ibid., 458. (In this case, the state offered six compelling interests that Amendment 2 served: it deterred political disagreement; protected the state's political functions; freed the state to focus more on other civil rights protections; prevented government interference into individual, family, and religious privacy; blocked government subsidization of a special interest group; and promoted children's well being).

Colorado Supreme Court then looked at the case again and found there was no compelling interest advanced by Amendment 2 and it was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.[30] The Colorado court's ruling "marked the first time that the highest court of any state had found it unconstitutional to deny certain rights to homosexuals."[31]

The defendants[32] in the case then appealed the decision to the U.S. Supreme Court. The Court granted certiorari, scheduling oral arguments for October 10, 1995.[33] While counsel for the respondents was somewhat confident given the lower court rulings, counsel Jean Dubofsky was also aware the Supreme Court had not taken a case regarding homosexual rights since *Bowers v. Hardwick,* and the Court had yet to rule positively on a case regarding homosexual rights.

Their worries about the case's outcome soon abated. Less than one minute into Colorado's presentation at oral argument, Justice Kennedy asked the Colorado Solicitor General if he could cite any precedent where the Court upheld a law like Amendment 2, which Kennedy described as making a classification "for its own sake."[34] Kennedy then rejected the Solicitor General's answer and stated "here, the classification is adopted to fence out. . .the class for all purposes, and I've never seen a statute like that."[35] Following Kennedy's lead, Justices Stevens, Breyer, Ginsburg, and Souter attacked the state's argument. Even Justice O'Connor, who had voted in the majority in *Bowers,* questioned whether the language of the Amendment meant that

[30] Ibid., 459. (The Colorado Supreme Court took the case and looked at the 6 previously listed compelling interests well as a seventh: "allowing the people themselves to establish public, social, and moral norms." Amendment 2 advanced that interest, Colorado claimed, by preserving heterosexual marriage and branding gay men, lesbians, and bisexuals immoral). See Evans v. Romer 882 P.2d 1335 (1994) (Evans II)
[31] Ibid.,
[32] Romer v. Evans, 517 U.S. 620, 625 (1996). ("Although Governor Romer had been on the record opposing the adoption of Amendment 2, he was named in his official capacity as the defendant, together with the Colorado Attorney General and the state of Colorado").
[33] Murdoch and Price, *Courting Justice: Gay Men and Lesbians*, 464
[34] Ibid., 466
[35] Ibid.,

"a public library could refuse to allow books to be borrowed by homosexuals, and there would be no relief from that"[36] While the Solicitor General argued it did not, O'Connor pressed further and asked, "well, how do we know that?"[37]

By the time the Solicitor General's thirty minute argument was over, counsel and plaintiffs for Evans were confident they had at least a 6-3 majority on their side. When Dubofsky stood to present her argument,[38] she spent much of her allotted time answering "that is correct" from the six justices. Even when Justice Scalia tried to imply that Amendment 2 served to prohibit "special provisions giving special protections" for those with "homosexual orientation," Dubofsky reminded him that the anti-discrimination laws banned discrimination on *sexual orientation*, and since all people have a sexual orientation, the laws Amendment 2 sought to repeal protected everyone, not just homosexuals.[39]

The oral argument for *Romer v. Evans* marked a distinctive shift in the gay rights movement in the eyes of the judiciary. As Murdoch and Price put it in *Courting Justice*:

> Never before had the U.S. Supreme Court justices talked publicly about gay people as ordinary folks who check out library books, eat in restaurants, hold jobs and might need police protection or kidney dialysis. Never before had a majority of justices hammered away at a blatant attempt to discriminate against gay people. Never before had a majority sounded so ready to wrap gay and bisexual Americans in the Constitution's protection.[40]

When it came time to decide who was going to write the majority opinion, serendipity might have played a role. Because Chief Justice Rehnquist was in the minority in *Romer*, the most senior member of the winning side, in this case Justice Stevens, got to choose the author of

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[36] Ibid., 467
[37] Ibid.,
[38] Ibid., 461-462. She encouraged the Court to use the same reasoning the Colorado Supreme Court did and subject Amendment 2 to strict scrutiny. ("Under Amendment 2, all efforts by the government to protect gay people from discrimination are swept away. . .from the police officer who refuses to patrol gay neighborhoods or provide backup assistance to lesbian police officers [like Amendment 2 challenger] Angela Romero, to the judge who decides cases based on animus towards lesbians and gay men, even state actors who irrationally and maliciously discriminate based on sexual orientation are immune from state legislative, executive, and administrative or judicial remedy").
[39] Ibid., 471
[40] Ibid., 471

the majority opinion. Though it is hard to say exactly *why* Stevens chose Kennedy to write the opinion, the testimony of some clerks on the Court that term is that Stevens chose Kennedy to keep O'Connor in the majority.[41] Regardless of *why* Kennedy was elected to write the opinion, he did, and on May 20, 1996, the Court announced in a 6-3 decision that Amendment 2 violated the Equal Protection Clause.

In *Romer v. Evans,* Justice Kennedy focused on two main ideas to determine that Amendment 2 was unconstitutional. First, that Amendment 2 had an inexplicably large sweep by both repealing all existing anti-discrimination legislation and barring more protections from ever being adopted in the future. Second, he wrote that there was no rational reason, other than animus, for a law to make it more difficult for one group of citizens to seek protections from the government:[42]

> We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A state cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause, and the judgment of the Supreme Court in Colorado is confirmed.[43]

Kennedy argued that even if the amendment was narrowly construed, it made Colorado's gay and bisexual community totally vulnerable to irrational and arbitrary discrimination that Colorado law otherwise protects against.[44] Kennedy wrote that the amendment demands that homosexuals be put in a "solitary class" and withdraws "from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies."[45]

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[41] Ibid., 474 (Justice O'Connor voted to uphold the sodomy bans in 1986 in *Bowers*).
[42] Romer v. Evans, 517 U.S. 620, 632 (1996).
[43] Ibid., at 635
[44] Murdoch and Price, *Courting Justice: Gay Men and Lesbians*, 471.
[45] Romer v. Evans, 517 U.S. 620, 627-628 (1996).

Additionally, Kennedy rejected the state's argument that Amendment 2 was intended to conserve resources to fight discrimination against suspect classes, because Amendment 2 did not say *anything* about other non-suspect classes protected under Colorado law.[46] On the contrary, Kennedy noted:

> [T]he Amendment imposes a special disability upon [homosexuals] alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. . . We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.[47]

Second, Kennedy acknowledged that while all laws classify persons for certain reasons, and those classifications may disadvantage a group, the classification can be upheld "so long as it bears a *rational* relation to some legitimate end."[48] Kennedy further argued Amendment 2 had no rational relation to a government interest because it not only imposed a broad and undifferentiated disability on a single named group, but also because the scope of the amendment could leave no explanation except animus for the class that it affected.[49] Kennedy wrote that "Amendment 2 fails, indeed defies, even this conventional inquiry."[50]

While it is notable that Kennedy argued that Amendment 2 could not pass even the lowest level of scrutiny under the Fourteenth Amendment, he simultaneously rejected the Colorado Supreme Court's reasoning that Amendment 2 should be subject to strict scrutiny. In other words, Kennedy's opinion focused more on the negative effects and unconstitutionality of

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[46] Ibid., at 629: Colorado had passed anti-discrimination laws for age, military status, marital status, pregnancy, parenthood, custody of a minor child, political affiliation, physical or mental disability, in addition to sexual orientation. The state's argument that sexual orientation could not be covered because it gives homosexuals an unfair advantage doesn't make sense, Kennedy asserts, because all of those other groups are protected. Therefore, Amendment 2 was passed to harm homosexuals in a way that no other group was.
[47] Ibid., at 630
[48] Ibid., at 631 emphasis added
[49] Ibid., at 632
[50] Ibid., at 621

Amendment 2 than on the level of scrutiny or majority rights.[51] While it is unclear exactly *why* Kennedy chose not to determine the level of scrutiny for laws that classify based on sexual orientation, scholars have offered some possible reasons.

As one brief submitted to the Court in *Romer* argued, the Supreme Court did not have to determine the appropriate level of scrutiny for laws classifying homosexuals because Amendment 2 violated the Equal Protection Clause on its face and could not even pass rational basis.[52] Therefore, the Court may have found it unnecessary to get bogged down in levels of scrutiny. Additionally, Kennedy may have been less likely to garner a majority if he had insisted upon heightened or strict equal protection scrutiny in *Romer* because a lower court had rejected the plaintiffs' arguments that sexual orientation was a suspect or quasi-suspect classification.[53] Furthermore, because challengers to Amendment 2 did not appeal that specific part of the lower court ruling, the Supreme Court did not have a reason to rule on it.[54]

Another possible reason why Kennedy eschewed determining the level of scrutiny for sexual orientation could be the case-by-case approach that Kennedy employed throughout his time on the Ninth Circuit. The question in *Romer* the Court had to answer was whether Amendment 2 was unconstitutional under the Fourteenth Amendment, and Kennedy answered it without making a sweeping decision on scrutiny that would have protected gays more fully under the law. Just as the Supreme Court's landmark 1954 *Brown v. Board of Education* decision simply answered the separate-but-equal question and did not address voting rights or bans on

[51] Murdoch and Price, *Courting Justice: Gay Men and Lesbians*, 471.
[52] Ibid., 462. Citing Brief of Laurence H. Tribe, John Hartely, Gerald Gunther, Philip B. Kurland, Kathleen M. Sullivan, as Amici Curiae Support of Respondents, Romer v. Evans 517 U.S. 620 (1996).
[53] Evans v. Romer, 882 P.2d 1335, 1341 n.3 (Colo. 1994).
[54] Nicolas, "Obergefell's Squandered Potential," 138.

interracial marriage, Kennedy's opinion did not address gay rights issues not directly raised in Amendment 2.[55] Nevertheless, as Murdoch and Price argue:

> [T]he Court broke with its own antigay past to declare that hatred is not a legitimate reason to treat gay Americans as second class citizens. Measuring Amendment 2 against the minimal requirement that it bear a rational relationship to a legitimate state interest, Kennedy found that it simply did not make sense -- except as an expression of "animus" or animosity.[56]

Perhaps most importantly, with the *Romer* opinion Kennedy fulfilled the promise implicit in his 1980 *Beller* ruling that gay constitutional claims had to be taken seriously and that laws created for no other purpose than to discriminate cannot stand under any standard of review.[57]

On the other hand, the ruling also gave little or no guidance to lower courts on how to proceed with cases regarding homosexual rights that did not deal specifically with anti-discrimination laws. In other words, it was difficult to determine how much "equal protection" gay Americans had won because even though six justices "had drawn a line and scolded Colorado for having crossed it. . .they gave no reliable hint of what else -- if anything -- they would view as over the line."[58] Furthermore, while the Supreme Court ruled that gay Americans were not "strangers to the law," and had rights under the Equal Protection Clause, the opinion and reasoning gave no indication that other laws that classified gays, such as bans on them serving in the military or bans on same sex sodomy, were unconstitutional as well.[59] Because the Court did not provide a sweeping ruling that stated that any law which classified according to sexual orientation was subject to strict or heightened scrutiny, litigants would need to challenge each issue involving such classifications one by one. In other words, "[g]iven no guidance, most lower court judges [chose] the weak 'rational basis' standard that most always [meant]

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[55] Murdoch and Price, *Courting Justice: Gay Men and Lesbians*, 478.
[56] Ibid., 476
[57] Ibid., 467
[58] Ibid., 481
[59] Ibid., 482

discrimination [won]."[60] For example, though *Romer* stated that homosexuals could not remain "strangers to the laws," gay soldiers were persecuted and discharged from the military until 2011, when Don't Ask Don't Tell was repealed because -- for fifteen years after *Romer* -- barring open homosexuals from serving in the military was understood to be rationally related to serve a legitimate state interest.

Between *Romer v. Evans* and 2003 the Court refused to hear several cases on gay rights,[61] but ruled on some cases that involved homosexuality in broader contexts.[62] Perhaps the most interesting development during this time, however, was the change in the Court's rhetoric about homosexuals generally. During this time the Court started to become more comfortable with discussing homosexuals as human beings.[63] The cases that the justices turned away, however, revealed the contradictory ways the outside world was responding to gay demands for full equality.[64] While the Court had said that homosexuals could not be strangers to America's laws in *Romer*, many judges used the *Bowers v. Hardwick* sodomy decision as a homophobic

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[60] Ibid., 525

[61] Paul G. Thomasson v. William Perry et al, 895 F. Supp. 820 (4th Cir. 1995). (Case challenged the Military's Don't Ask, Don't Tell policy. Court denied certiorari on October 21, 1996); Lumpkin v. Brown, 109 F.3d 1498, (9th Cir. 1997). (City of San Francisco fired Lumpkin, a pastor, from the city Human Rights Commission because he made statements condemning homosexuality. Lumpkin sued the Mayor of San Francisco arguing his rights under the First Amendment and the Religious Freedom Restoration Act (RFRA) had been violated. Court denied certiorari); Shahar v. Bowers, 120 F.3d 211, (11th Cir. 1997). (Shahar was hired by Attorney General Bowers in Georgia, but was fired when Bowers discovered Shahar was partaking in a commitment ceremony with her same-sex partner. Court denied certiorari).

[62] Boy Scouts of America v. Dale 530 U.S. 640 (2000). (Court ruled 5-4 that applying New Jersey's public accommodations law to require BSA to allow open homosexuals serve as troop leaders violated the BSA's First Amendment right to freedom of association. Kennedy voted in the majority); Board of Regents, University of Wisconsin System v. Southworth 529 U.S. 217 (2000). (Conservative students at the University of Wisconsin brought suit against the university saying that requiring them to pay a fee to subsidize campus groups that may promote gay equality violated their First Amendment rights. Court ruled unanimously that public universities could charge students an activity fee to subsidize campus groups without violating the First Amendment rights of students who find some campus groups objectionable. Kennedy authored the opinion).

[63] See Murdoch and Price, *Courting Justice: Gay Men and Lesbians*, 494. ("In grappling with gay related cases after *Romer,* the Justices demonstrated increasing sophistication in and increasing comfort in dealing with homosexuality.")

[64] Ibid., 488-489: ("The Justices were offered glimpses of the most virulent strand of homophobia produced in the 1990s, competing churches tug of war over homosexuality, the increasing efforts of many state and local governments to protect their gay citizens and the continued use of the *Hardwick* sodomy decision as an all purpose antigay weapon.")

weapon.[65] Perhaps the Court was waiting to take a case that was worth hearing; it turned out to be *Lawrence v. Texas,* and once again, Kennedy was given an opportunity to give equal rights to gays.

Lawrence et al v. Texas

In *Lawrence,* the Court decided that all laws criminalizing sodomy were unconstitutional under the Due Process Clause. Though every state in America had laws banning sodomy at one point, by the time the Court ruled in 2003, only 11 states still had them in place.[66] In Texas specifically, the state had passed a sodomy law in 1859 and it applied to heterosexual and homosexual sodomy alike.[67] In 1970 a federal judge in the state declared that the state sodomy law was unconstitutional as applied to married couples.[68] During this time Texas also liberalized many of the state's sex laws for heterosexuals by decriminalizing adultery, fornication, seduction, and even bestiality.[69] However, despite these progressive rulings, homosexuals were still considered second-class citizens whose actions could be criminalized. In fact, in 1973, Texas tightened its sodomy law to criminalize "deviate sexual intercourse" and a "Homosexual Conduct" provision of the law made deviate sexual conduct a crime only if performed "with another individual of the same sex."[70] While it is unclear how often the law was enforced,[71] it

[65] Ibid.,
[66] However, it is important to note that while all 50 states had sodomy bans at one point, it was only in the 1970s that any state singled out homosexual sodomy and only 9 states -- Arkansas, Kansas, Kentucky, Missouri, Montana, Nevada, Tennessee, Texas, Oklahoma -- ever enacted such laws. Since the Court ruled in *Bowers v. Hardwick,* Arkansas, Montana, Tennessee, Kentucky, and Nevada all repealed their sodomy laws targeting homosexuals. See Lawrence v. Texas, 539 U.S. 558, 570 (2003).
[67] The law, however, was unenforceable until 1879. See Dale Carpenter, *Flagrant Conduct: The Story of Lawrence v. Texas : How a Bedroom Arrest Decriminalized Gay Americans* (New York: W.W. Norton, 2012), 9.
[68] Ibid., 11.
[69] Ibid.,
[70] Ibid., 11-13
[71] Ibid., ("In the entire 143 year history of the Texas sodomy law, from its enactment until struck down in *Lawrence,* there are no publicly reported court decisions involving the enforcement of the law against consensual sex between adult persons in a private space.")

took three decades for a challenge to the law to be successful and the law to be declared unconstitutional.

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On September 17, 1998, a Houston police officer responded to a reported weapons disturbance at a private residence. Upon arrival at the residence, the officer found John Lawrence and Tyron Garner engaging in a sexual act. Lawrence and Garner were then arrested and charged with violating Texas Penal Code Ann. 21.06(a) which read: "[a] person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex."[72] Lawrence and Garner pleaded no contest and were each charged $125 and then appealed the decision to the Harris County Criminal Court.[73] The lawyers for Lawrence and Garner argued the law violated the Equal Protection Clause because it only prohibited sodomy against same-sex couples and not heterosexual couples.[74] Additionally, counsel for the plaintiffs argued that the law violated the plaintiffs' right to privacy and contended that *Bowers v. Hardwick* was wrongly decided.[75] The judge in Harris County rejected the arguments and charged Lawrence and Garner $200 each.[76]

Counsel for the defendants then appealed the decision to a three-judge panel[77] of the Texas Court of Appeals, which declared that the Texas law was unconstitutional under the 1972 Equal Rights Amendment to the Texas Constitution.[78] The judge found the law "inexplicable on any rational ground of public policy" and concluded that there was no legitimate justification to

[72] The law had been changed to signal just homosexuals in 1973 and was effective January 1, 1974.(21.01 DEFINITIONS. In this chapter: (I) "deviate sexual intercourse" means: (A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object). See Ibid., 24 and Lawrence v. Texas, 539 U.S. 558, 563 (2003).
[73] Carpenter, *Flagrant Conduct: The Story*, 140.
[74] Ibid., 148
[75] Ibid., 148-149
[76] Lawrence v. Texas, 539 U.S. 558, 563 (2003).
[77] Only three of the nine judges on the court heard arguments and ruled on the case.
[78] Carpenter, *Flagrant Conduct: The Story*, 164-167. (Found that the law violated the 1972 Equal Rights Amendment to the Texas Constitution which bars discrimination based on sex, race, color, creed, or national origin)

target only gay people.[79] However, the panel's decision was reversed by the entire court of appeals which upheld the constitutionality of the law 7-2, rejecting both the equal protection and due process arguments.[80] Attorneys for Lawrence and Garner appealed to the Texas Court of Criminal Appeals, and after their request was denied, filed a petition for certiorari to the U.S. Supreme Court on July 16, 2002. In December of that year their petition was granted.[81]

As with *Romer,* we do not know why the justices voted to hear the case, or why, once again, Justice Kennedy was chosen to write the majority opinion. On June 26, 2003, the Court announced in a 6-3 decision that the Texas law was unconstitutional under the Fourteenth Amendment. According to Michael J. Rosenfeld:

> The basis of the *Lawrence* decision (consistent with *Griswold*, *Eisenstadt*, *Roe* and *Loving*) was that the individual right to privacy was more important than community standards, more important than popular opinion, and more important than the original intent of the framers of the U.S. Constitution.[82]

Furthermore, in his opinion Kennedy focused more on the implicit right to privacy established in *Griswold* than on scrutiny and equal protection.[83] He highlighted three main points: (1) that homosexuals had a protected liberty interest to engage in private, sexual activity; (2) that homosexuals' moral and sexual choices were entitled to constitutional protection under the Due Process Clause; (3) and that moral disapproval did not provide a legitimate justification for Texas to criminalize homosexual sodomy. Regarding the first point, Kennedy noted there was substantial precedent outlining "[the] broad statements of the substantive reach of liberty under the Due Process Clause."[84] Moreover, he argued that the Court in *Bowers* had approached

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[79] Carpenter, *Flagrant Conduct: The Story*, 167.
[80] Ibid., 175
[81] Ibid., 184-185
[82] Michael J. Rosenfeld, *The Age of Independence: Interracial Unions, Same-sex Unions, and the Changing American Family* (Cambridge, Mass.: Harvard University Press, 2007), 166.
[83] Refer to Chapter I's discussion of Griswold v. Connecticut
[84] Pierce v. Society of Sisters, 268 U.S. 510 (1925): ("the fundamental *liberty* upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept

the case incorrectly by focusing on determining if there was a right to engage in certain homosexual conduct, and by doing so, the Court belittled the liberty interest at stake.[85]

Furthermore, Kennedy asserted:

> When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.[86]

Regarding the second point, Kennedy explained why the statute is invalid under the Due Process Clause and not the Equal Protection Clause:

> Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in it of itself is an invitation to subject homosexual persons to discrimination both in the public and private spheres. The central holding in *Bowers* has been brought into question by this case and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.[87]

In other words, while Kennedy acknowledged that counsel for *Lawrence* and some briefs argued the statute should be struck on equal protection grounds similarly to *Romer*, he refused to do so given that the law upheld in *Bowers* treated homosexuals and heterosexuals equally, and therefore could not be overturned using the equal protection grounds he employed in *Romer*. More specifically, Kennedy wrote:

> [W]ere we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same sex and different sex participants.[88]

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instruction from public teachers only.") cited in Lawrence regarding the broad reach of liberty; Griswold v. Connecticut, 381 U.S. 479 (1965): (The Court reasoned there was a protected interest in the right to privacy and placed emphasis on the marital bedroom); Eisenstadt v. Baird, 405 U.S. 438, (1972): (The Court determined that there was a right to make certain decisions about sexual conduct outside the marital relationship, and unmarried couples or and single people have rights to sexual privacy too just like married people.)

[85] Lawrence v. Texas, 539 U.S. 558, 567 (2003).

[86] Ibid.,

[87] Ibid., at 575

[88] Ibid., at 575

In looking at the case through due process, therefore, Kennedy declared that laws banning *anyone* from making independent decisions about their sex lives are unconstitutional, and that reasoning goes beyond what an equal protection argument could.

Regarding the third point, concerning moral disapproval, Kennedy conceded that the *Bowers* court sought to establish that homosexual conduct, which had been condemned for a long time, was immoral. However, Kennedy noted that "this Court's obligation is to define the liberty of all, not to mandate its own moral code,"[89] and the issue before the Court therefore was "whether the majority can use the Power of the state to enforce these views on the whole society through operations of the criminal law."[90] Kennedy argued that the state was prohibited from doing so under the Due Process Clause of the Fourteenth Amendment which protects the liberty of all persons under the law, writing that "liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[91] In making autonomous choices about their sexual conduct, Kennedy argued, homosexuals assert their liberty right, and the ruling in *Bowers* denied homosexuals this right. Therefore, it could not stand.

Furthermore, Kennedy explicitly stated that the reasoning used in Stevens' dissent in *Bowers* was correct in stating that moral disapproval of a group or practice is insufficient to uphold a law targeting a group or banning a practice.[92] Kennedy further asserted that "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."[93] In his 18-page opinion, he

[89] Ibid., at 559 citing Planned Parenthood of Southeastern PA v. Casey, 505 U.S. 833, 850 (1992).
[90] Ibid., at 571
[91] Ibid., at 574
[92] Ibid., at 577
[93] Ibid., at 578

struck down all sodomy laws in America and deemed any state control of sexual conduct, for heterosexuals and homosexuals alike, unconstitutional.

While there is much to celebrate in his decision in *Lawrence,* as in *Romer,* Kennedy avoided determining the level of scrutiny the Court should use when confronted with laws classifying on the basis of sexual orientation. As mentioned, Kennedy's *stated* reason for not deciding the case on equal protection grounds is because he wanted to overrule *Bowers* and thought deciding *Lawrence* on equal protection grounds made it impossible to do so. That said, some scholars contend that Kennedy could have used the reasoning in *Loving* to apply the due process clause to overrule *Bowers* and then apply the equal protection clause to declare that sexual orientation was a suspect or semi-suspect classification.[94] Alternatively, Kennedy could have overruled *Bowers* using the reasoning in *Loving,* that bans on interracial marriage were unconstitutional even if whites and blacks were punished *equally*, because the "equal application" of a criminal statute did not mean it was valid under the Equal Protection Clause.[95] Therefore, Kennedy could have argued that simply because the statute upheld in *Bowers* exemplified "equal application" of a criminal statute to all people, not just homosexuals, the Court's opinion was strictly framed in terms of the absence of a right to engage in homosexual sodomy, not sodomy generally.

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[94] Nicolas, "Obergefell's Squandered Potential," 139. ("Yet even if he felt compelled to address the due process claims and overrule *Bowers,* Justice Kennedy could have also addressed the class-based equal protection claim by following the example of Loving v. Virginia. There the Court struck down miscegenation laws alternatively on the ground that they violated the fundamental right to marry *and* the ground that they constituted class-based discrimination in violation of the Equal Protection Clause.")

[95] Loving v. Virginia, 388 U.S. 1, 8-9 (1967). ("Because we reject the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations, we do not accept the State's contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose. . .the case of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.") While I acknowledge there is not a perfect comparison between race and sexual orientation, my argument focuses more on the benefits of being protected as a suspect or semi-suspect class.

While Kennedy arguably missed another prime opportunity to protect homosexuals more broadly from discrimination, the decision did provide precedent for later cases. Most notably, almost immediately after *Lawrence v. Texas* was decided, the American press and public went into a frenzy about what the ruling could possibly mean for same-sex marriage. As one scholar noted, "[p]rint media, television journalists, and online commentators all seemed to converge around the assumption reflected in the *Los Angeles Times* headline: 'Ruling Seen as Precursor to Same-Sex Marriages.'"[96] While Justice Kennedy's opinion never mentioned same-sex marriage in *Lawrence,* and, on the contrary, attempted to distance the *Lawrence* ruling from same-sex marriage,[97] Justice Scalia's scathing dissent called direct attention to it.[98] In the world outside the courthouse, Ontario's legalization of same-sex marriage in early June 2003,[99] and the Massachusetts Supreme Court's pending decision on same-sex marriage in the state,[100] almost immediately linked *Lawrence* and same-sex marriage for many on both sides of the argument.[101]

Potentially reacting to the fear that America was moving too quickly in the direction of full equality for gays, overall support for same-sex marriage declined among all ideological

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[96] John D'Emilio, "Will the Courts Set Us Free? Reflections on the Campaign for Same-Sex Marriage," in *The Politics of Same-sex Marriage*, ed. Craig A. Rimmerman and Clyde Wilcox (Chicago: University of Chicago Press, 2007), 43. Citing David G. Savage, "Ruling Seen as Precursor to Same-Sex Marriages," *LA Times* (Los Angeles, CA), June 28, 2003, accessed February 21, 2016, http://articles.latimes.com/2003/jun/28/nation/na-scotus28.

[97] Lawrence v. Texas, 539 U.S. 558, 578 (2003). (Kennedy explicitly writes the ruling ". . .not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.")

[98] Scalia's dissent was both scathing and direct; he charged "today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition of marriage is concerned. Ibid., at 604 (Scalia, J., dissenting). Furthermore, he argued Justice Kennedy's reasoning "leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples." Ibid., at 601 (Scalia, J., dissenting).

[99] D'Emilio, "Will the Courts Set Us Free?," in *The Politics of Same-sex*, 43. Canada. Klarman, *From the Closet to the Altar*, 87.

[100] Goodridge v. Department of Public Health, 798 N.E.2d 941 (2003). Goodridge was decided November 18, 2003. ("For the reasons we explain below, we conclude that the marriage ban does not meet the rational basis test for either due process or equal protection. Because the statute does not survive rational basis review, we do not consider the plaintiffs' arguments that this case merits strict judicial scrutiny").

[101] Klarman, *From the Closet to the Altar*, 87. Additionally, the day after *Lawrence* was decided, a state judge in New Jersey heard arguments in a gay marriage case. In September 2003, New York's Democratic Party became the third in the nation to endorse same-sex marriage.

groups in the period of time immediately after *Lawrence.*[102] However, as Kennedy stated in *Lawrence*:

> [T]imes can bind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its certain principles in their own search for greater freedom.[103]

While Kennedy understood that in 2003 only heterosexual marriage could be permitted, he also understood that with time, some laws might be challenged in order to promote greater freedom for all. Kennedy was given that opportunity to invoke newfound principles to search for greater freedom for homosexuals a decade later in *United States v. Windsor* and *Hollingsworth v. Perry.*[104]

United States v. Windsor

Unlike both *Romer* and *Lawrence, United States v. Windsor* was the only case the Supreme Court heard leading up to *Obergefell* that dealt with a federal law and homosexuals. The case directly addressed Section 3 of the federal 1996 Defense of Marriage Act (DOMA),[105]

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[102] Ibid., 88

[103] Lawrence v. Texas, 539 U.S. 558, 579 (2003).

[104] Hollingsworth v. Perry 133 S. Ct. 2652 (2013). While the case Hollingsworth v. Perry marks an important part of the path to same-sex marriage in the United States, this thesis focuses solely on Justice Kennedy's opinions. The case dealt with the constitutionality of Proposition 8, which, in 2008, California voted to amend the California Constitution to provide that: "only marriage between a man and a woman is valid or recognized by California." The respondents, a gay couple and a lesbian couple, sued the state officials responsible for the enforcement of California's marriage laws and claimed that Proposition 8 violated their Fourteenth Amendment right to equal protection of the law. When the state officials originally named in the suit informed the district court that they could not defend Proposition 8, the petitioners, official proponents of the measure, intervened to defend it. The district court held that Proposition 8 violated the Constitution, and the U.S. Court of Appeals for the Ninth Circuit affirmed. Ultimately in this case the Supreme Court voted that the officials did not have standing to bring the issue to the Supreme Court, Justice Kennedy dissented. See Solomon, *Winning Marriage: The inside*, 319; Chicago-Kent College of Law at Illinois Tech, "Hollingsworth v. Perry," Oyez, accessed February 22, 2016, https://www.oyez.org/cases/2012/12-144;

[105] DOMA was introduced to the United States House in May 1996 in response to the same-sex marriage case in Hawaii. DOMA provided that states did not have to recognize marriages that were legally performed in other states, and Section 3 stated: "in determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the words 'spouse' refers only to a person of the opposite sex who is a husband or wife. 1 U.S.C §7." DOMA had overwhelming support and passed the

which defined 'marriage' as a union between a man and a woman, and 'spouse' as someone of the opposite sex.[106] Under DOMA, same-sex couples could not receive federal benefits of any kind even if their marriage was legal in the state where they lived. Under DOMA, only marriage between a man and a woman would receive social security survivorship benefits, immigration rights, and the privilege of filing joint tax returns.[107]

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In 2007 New York residents Edith Windsor and Thea Spyer were married in Ontario, Canada after living together for forty-four years.[108] At the time, New York did not allow same-sex marriage; however, Windsor and Spyer were able to live in New York as a married couple because the state fully recognized same-sex marriages that were legally performed elsewhere.[109] In 2009 Thea Spyer passed away and left her entire estate to Windsor. When Windsor attempted to claim the federal estate tax exemption for surviving spouses, she was prohibited from doing so under §3 of DOMA and had to pay $363,053 in estate taxes. She then sought a refund from the IRS but was denied. Windsor filed a federal lawsuit and argued that DOMA violated equal

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House 342-67 and the Senate 85-14 before being signed by President Bill Clinton September 21, 1996. See Klarman, *From the Closet to the Altar*, 61-63.

[106] In Baehr v. Lewin, the Hawaii Supreme Court voted in 1993 that restricting marriage to a man and a woman constituted a sex classification and under the Hawaii Constitution's equal rights amendment, and the law was therefore subject to strict scrutiny. Hawaii returned the case to the trial court for a hearing on whether the state could demonstrate they had a compelling state interest in excluding same-sex couples from marriage. The trial in *Baehr* was rescheduled for September 1996 and in December Judge Kevin Chang ruled that the state had no compelling justification for excluding same-sex couples from marriage. In response to the ruling, the legislature passed a constitutional amendment that limited marriage to a union between one man and one woman. The amendment was put on the ballot for a referendum in November 1998 and was approved 69 percent to 31 percent. By the time Hawaii passed the Amendment, over thirty states had passed defense of marriage acts. See Klarman, *From the Closet to the Altar*, 56, 66. While the case in Hawaii is important for same-sex marriage and how states in particular reacted to the issue, this paper will not discuss the actions of the state at length. See table 1 in appendix for information about Hawaii's path to same-sex marriage.

[107] Klarman, *From the Closet to the Altar*, 61.

[108] Marc Solomon, *Winning Marriage: The inside Story of How Same-Sex Couples Took on the Politicians and Pundits--and Won* (Lebanon, NH: University Press of New England, 2014), 285.

[109] Jeremy Peters, "New York to Back Same-Sex Unions from Elsewhere," *The New York Times*, May 29, 2008, accessed February 22, 2016, http://www.nytimes.com/2008/05/29/nyregion/29marriage.html?_r=2; "The Freedom to Marry in New York," Freedom to Marry, accessed February 22, 2016, http://www.freedomtomarry.org/states/new-york.

protection principles in the Fifth Amendment made applicable to the states through the Fourteenth Amendment. Using rational basis review, the district court found §3 unconstitutional and ordered the U.S. Treasury Department to refund Windsor's tax with interest.[110] The United States[111] appealed the ruling to the Second Circuit Court of Appeals, which affirmed the district court's ruling.[112] The United States then appealed the decision to the Supreme Court, which granted certiorari December 7, 2012.

Oral argument for *United States v. Windsor* was held on March 27, 2013. Solicitor General Donald Verrilli for the United States made three main arguments about the interests DOMA furthered: DOMA induces couples to marry and have children within marriage; DOMA encourages uniformity in the administration of federal benefits; and DOMA saves the federal government money.[113] Additionally, counsel for the United States argued that states were traditionally able to decide their marriage laws; marriage was traditionally understood as a union between a man and a woman; and the Court should be cautious in declaring DOMA unconstitutional.[114] In contrast, Windsor's brief contended that while the Court should apply heightened scrutiny to DOMA because it discriminated on the basis of sexual orientation, even

[110] Brief for Edith Schlain Windsor, as Merits Curiae Supporting Respondent at 11, *United States v. Windsor*, U.S. 570 (2013). Citing district court's opinion which stated there was no logical relationship between DOMA and the goal of promoting responsible procreation or child rearing by straight couples. Court asserted DOMA had no direct impact on heterosexuals at all.

[111] Before the district court released the initial ruling, the Attorney General (Eric Holder) notified Speaker of the House (John Boehner) that the Department of Justice would no longer defend Section 3 as constitutional. In response, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives voted to intervene and defend Section 3's constitutionality.

[112] Brief for Edith Schlain Windsor, as Merits Curiae Supporting Respondent at 12-13 United States v. Windsor, U.S. 570 (2013). The Second Circuit applied heightened scrutiny to Section 3 of DOMA ("considering the factors that this Court has used to decide whether to treat a particular classification as suspect or quasi-suspect, the Second Circuit found that 'all four factors justify heightened scrutiny' of discrimination on the basis of sexual orientation: 'A) homosexuals as a group have historically endured persecution and discrimination; B) homosexuality has no relation to aptitude or ability to contribute to society; C) homosexuals are a discernible group with non-obvious distinguishing characteristics, especially in the subset of those who enter into same-sex marriages; and D) the class remains a politically weakened minority.") Citing lower court ruling 15a-16a

[113] Brief for the United States, as Merits Curiae Supporting Petitioner, United States v. Windsor, No. 12-307, slip op. 1 (2013).

[114] Ibid., 17

under the rational basis test DOMA was unconstitutional.[115] Counsel argued the law could not withstand the lowest level of scrutiny because it targeted an unpopular group, imposed sweeping disabilities without factual context, and was outside of America's "constitutional tradition."[116]

On June 26, 2013, ten years to the day after *Lawrence v. Texas*, the Court announced in a 5-4 decision that Section 3 of DOMA was unconstitutional. In his majority opinion, Justice Kennedy focused on the history of state regulation of marriage, the purpose of DOMA, and the equal dignity and liberty interest of same-sex couples protected by the Fifth Amendment. Kennedy asserted that states have always defined and regulated their own marriage laws, and while these laws must respect the constitutional rights of citizens, states had the power to create the laws.[117] Furthermore, while Kennedy acknowledged that states are able to pass and enforce their marriage laws, within the confines of an individual state, marriage laws must be applied equally to all married couples. In other words, because New York had the right to legalize same-sex marriage, the federal government had to make marriage benefits accessible to same-sex couples in New York and all other states that legalized same-sex marriage.[118] Furthermore, Kennedy argued that while the federal government could regulate the meaning of marriage to further a federal policy, like establishing income based criteria for social security benefits, DOMA was applicable to "over 1,000 federal statutes and [a] whole realm of federal regulations"[119] that broadly affected citizens' everyday lives.

Kennedy also argued that the 11 states and the District of Columbia that had legalized same-sex marriage before *Windsor* had given same-sex couples who seek to marry "a dignity and

[115] Ibid., 15
[116] Ibid., 16
[117] United States v. Windsor, No. 12-307, slip op. 1, 16 (2013).
[118] Ibid., 18
[119] Ibid., 16

status of immense report," but that DOMA sought to strip them of that dignity.[120] Quite bluntly, he asserted that while New York sought to give protection and dignity to same-sex marriages and same-sex couples, DOMA's aim was to injure same-sex couples and "impose a disadvantage, a separate status, and so a stigma upon all those who enter into same-sex marriages made lawful by the unquestioned authority of the states."[121] And he goes on to say:

> As the title and dynamics of the bill indicate, its purpose is to discourage enactment of state same-sex marriage laws and to restrict the freedom and choice of couples married under these laws if they are enacted. . . The Act's demonstrated purpose is to ensure that if any state decides to recognize same-sex marriage, those unions will be treated as second class marriages for the purposes of federal law.[122]

In terms of the constitutionality of DOMA, Kennedy asserted that DOMA denied same-sex couples the liberty protected by the Due Process Clause of the Fifth Amendment. Kennedy further argued that DOMA "writes inequality into the entire United States code" by identifying a subset of state-sanctioned marriages and declaring them unequal to heterosexual marriages and unworthy of federal recognition.[123] Kennedy asserted that DOMA had several negative consequences including the humiliation of the "tens of thousands of children now being raised by same-sex couples," who, because of the law, could not "understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."[124] He concluded by stating that "the federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the state, by its marriage laws, sought to protect in personhood and dignity."[125]

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[120] Ibid., 18
[121] Ibid., 21
[122] Ibid., 21-22
[123] Ibid., 22-23
[124] Ibid., 23
[125] Ibid., 25-26

For all the eloquent language on behalf of gays and lesbians in *Windsor,* Kennedy's opinion, as in *Romer* and *Lawrence,* did not determine that sexual orientation was a suspect or semi-suspect classification. Moreover in contrast to *Romer* and *Lawrence,* it avoided addressing equal protection in terms of scrutiny or a law's relationship to a state interest at all. While Kennedy arguably rejected DOMA on its face for putting same-sex couples in a solitary class below heterosexual couples, his opinion was not explicit in language or reasoning to that end. On the contrary, he discussed the *liberty* interest protected by the Fourteenth Amendment and the right to intimate association in terms of a right to privacy he discussed in *Lawrence*. For the first time, he based his reasoning on the idea that DOMA violates same-sex couples' right to equal *dignity.*

While Kennedy's failure to specify a level of scrutiny for sexual orientation classifications in *Romer* and *Lawrence* may have been reasonable, in *Windsor* it is much harder to defend. Unlike in *Romer* and *Lawrence,* there were no procedural hurdles in *Windsor* that stood in the Court's way to determine a level of scrutiny. Nevertheless, Kennedy "issued a murky opinion" to declare DOMA unconstitutional.[126] As SCOTUSblog's William Duncan wrote, not only did Kennedy not touch on the level of judicial review, but "the test that was applied [in *Windsor*] appeared to be notably indistinct."[127] Others argued that formulating a test for determining whether a statute interferes with the "equal dignity" is nearly impossible, if not equivocal.[128]

[126] Nicolas, "Obergefell's Squandered Potential," 139.
[127] Lyle Denniston, "Opinions Recap: Giant Step for Gay Marriage," SCOTUSblog, last modified June 26, 2013, accessed November 22, 2015, http://www.scotusblog.com/2013/06/opinions-recap-giant-step-for-gay-marriage/.
[128] William Duncan, "Bad News for Marriage, Good News for Government Power," SCOTUSblog, last modified June 26, 2013, accessed November 22, 2015, http://www.scotusblog.com/2013/06/bad-news-for-marriage-good-news-for-government-power/.

Windsor, like *Romer* and *Lawrence,* could reflect Justice Kennedy's desire to look at the issue narrowly and not give any guidance to lower courts for other gay rights issues. Arguably he did not need to address the level of scrutiny because he believed DOMA was unconstitutional whether strict scrutiny, heightened scrutiny, or the rational basis test was used. Another possibility is that Kennedy and the rest of the majority in *Windsor* knew that the arguments to apply a higher level of scrutiny were compelling and if they chose to determine the level in *Windsor,* it would have effectively ended the entire marriage debate nationwide.[129] *Windsor* was also a case involving a federal law with very broad implications for a whole range of issues.

However disappointing it may be that Justice Kennedy's opinions in *Romer, Lawrence,* and *Windsor,* did not secure broader protections of equality for homosexuals in America by determining a level of review for future gay rights cases, his opinions opened the door for acceptance and equal treatment of gays in America. While Kennedy sits right of center on some issues, his jurisprudence is notably progressive when it comes to some minority rights and individual freedom. Perhaps this can be attributed to the time he spent abroad as a student where he was exposed to more socially liberal views of his peers in the legal field. Perhaps it was that a close family friend during his childhood and legal mentor was gay. Perhaps it was the understanding that as time goes on, American law must adapt to invoke new principles and freedoms that were not considered before.

[129] Paul Smith, "The Court Opts for an Incremental Approach but a Major Victory Nonetheless," SCOTUSblog, last modified June 26, 2013, accessed November 22, 2015, http://www.scotusblog.com/2013/06/the-court-opts-for-an-incremental-approach-but-a-major-victory-nonetheless/.

CHAPTER III

Obergefell v. Hodges and a Call for Heightened Scrutiny

Living in a Post-*Windsor* World

While *United States v. Windsor* did not give lower courts a clear decision on the level of scrutiny for cases regarding classifications on sexual orientation, soon after the decision was announced, state legislatures and courts began overturning same-sex marriage bans across the country. Between June 2013 and November 2014, twenty-two states changed their marriage laws to legalize same-sex marriage and to recognize same-sex marriages that were performed elsewhere.[1] Despite these gains, however, fifteen states did not change their marriage laws after *Windsor* and same-sex couples in those states were still denied recognition of their relationships and all the benefits married couples receive.[2]

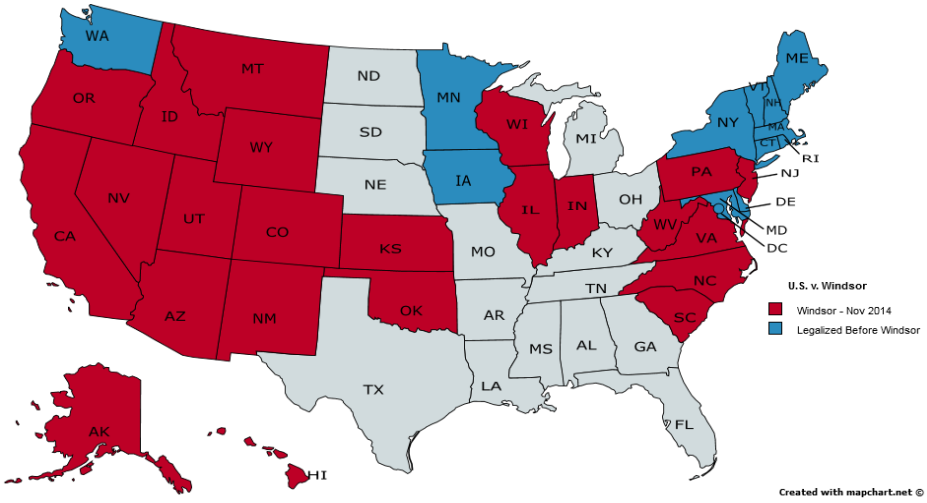

Figure 1. States Where Same-Sex Marriage was Legalized Between *Windsor* and November 2014. Blue Indicates States Where Same-Sex Marriage was Legal Before *Windsor*.

[1] California, New Jersey, Hawaii, Illinois, New Mexico, Oregon, Pennsylvania, Virginia, Colorado, Indiana, Oklahoma, Utah, Wisconsin, Kansas, Nevada, West Virginia, North Carolina, Alaska, Idaho, Arizona, Wyoming, South Carolina, Montana. See table 1 in the appendix for more information on individual states.
[2] Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, North Dakota, Ohio, South Dakota, Tennessee, and Texas. See table 1 in the appendix for more detailed information.

While lawsuits in nearly all fifteen states that kept their laws on the books were filed, only cases in four of those states were consolidated into one case in the Sixth Circuit and renamed *Obergefell v. Hodges.*[3] Specifically, *Obergefell* was the combination of six cases from Tennessee,[4] Michigan,[5] Kentucky,[6] and Ohio[7] involving thirty plaintiffs.[8] The plaintiffs had each filed federal suits arguing that laws in their respective states violated the Fourteenth Amendment

[3] Tanco v. Haslam, Governor of Tennessee, No. 14-571; DeBoer v. Snyder, Governor of Michigan, No. 14-571; Obergefell v. Richard Hodges, Director of Ohio Department of Health, No. 14-566; and Bourke v. Beshear, Governor of Kentucky, No. 14-574.

[4] The case Tanco v. Haslam was brought to Tennessee district court on October 21, 2013 by three couples challenging the state's same-sex marriage recognition ban. On March 14, 2014 Judge Aleta A. Trauger, a Clinton appointee, granted the plaintiffs the preliminary injunction which effectively barred the state from enforcing the same-sex marriage bans and the anti-recognition laws against the plaintiffs in the case. See Complaint for Declaratory and Injunctive Relief, Tanco v. Haslam, Governor of Tennessee, No. 3:13-cv-01159 (Oct. 21, 13); Preliminary Injunction, Tanco v. Haslam, No. 3:13-cv-01159 (March 14, 2014).

[5] The case DeBoer v. Snyder was brought in Michigan district court on January 2012 by one couple challenging the state's adoption law that prevented both parties from legally adopting their children because they were unmarried. The state moved to dismiss the lawsuit for lack of standing; Judge Bernard A. Friedman, a Reagan appointee, agreed the plaintiffs did not have standing in the adoption case, but encouraged the plaintiffs to re-file their case to challenge the same-sex marriage ban instead. The plaintiffs did so and the court ruled in their favor on March 21, 2014. See DeBoer v. Snyder, 772 F.3d 388, 397 (6th Cir. 2014) (citing DeBoer R. 151 at 3); and Amended Complaint for Declaratory and Injunctive Relief, DeBoer v. Snyder, ED Mi No. 12-10285 (Sep. 7, 2012).

[6] The case Bourke v. Beshear was brought to the Kentucky district court exactly one month after *Windsor.* Four couples brought suit challenging the state's recognition ban. On February 12, 2014, Judge John Heyburn II, a George H.W. Bush appointee, ruled that the denial of recognition for valid same-sex marriages violated the Equal Protection Clause and ordered the state to start recognizing marriages March 21. After that ruling, two couples in Love v. Beshear requested the court also grant injunction for the same-sex marriage bans in the state. Heyburn denied the request arguing that the couples should go through the standard procedure. On July 1, 2014 Judge Heyburn then overturned the Kentucky's same-sex marriage bans in Love v. Beshear using rational basis. See *DeBoer v. Snyder*, 772 F.3d 388, 397, 398 (6th Cir. 2014) and Memorandum Opinion, Bourke v. Beshear, No. 3:13-cv-750-H (Feb, 12, 2014); Brett Barrouquere, "Federal Judge Weighing Challenge to Kentucky Gay Marriage Ban," EdgeMediaNetwork, last modified January 14, 2014, accessed March 8, 2016, http://www.edgemedianetwork.com/index.php?ch=news&sc=national&sc2=news&sc3=&id=154209.

[7] The case Obergefell v. Kasich was brought to Ohio district court by two couples challenging Ohio's marriage recognition ban in its application for death certificates of same-sex couples. Additionally, Henry v. Wymyslo, was brought by four couples challenging the recognition bans in the state in its application for adoptions. The Judge Timothy Black, an Obama appointee, granted relief in *Obergefell* and concluded that the Fourteenth Amendment protects a fundamental right to keep existing marital relationships intact, and that the state failed to justify its law under heightened scrutiny. The court also concluded that classifications based on sexual orientation deserve heightened scrutiny under equal protection, but even under rational basis review, the state could not defend the recognition bans. In *Henry*, the district court reached many of the same conclusions and expanded its recognition remedy to encompass all married same-sex couples and all legal incidents of marriage under Ohio law. See DeBoer v. Snyder, 772 F.3d 388, 398, 399 (6th Cir. 2014) and Order Granting Plaintiffs' Motion for a Temporary Restraining Order, Obergefell v. Kasich, No. 1:13-cv-501 (July 22, 2013).

[8] Cynthia Godsoe, "Perfect Plaintiffs," *The Yale Law Journal* 125, no. 136 (October 12, 2015): 136, accessed March 3, 2016, http://www.yalelawjournal.org/forum/perfect-plaintiffs.

by denying them the right to marry, or prohibiting recognition of their marriages that were lawfully performed in another state.[9] Each district court ruled in the petitioner's favor, but the states appealed the decisions to the Sixth Circuit,[10] which consolidated the cases and then reversed on November 6, 2014.[11] On November 17, 2014 the plaintiffs appealed the case to the Supreme Court, and on January 16, 2015 the Supreme Court granted certiorari for *Obergefell v. Hodges,* scheduling oral argument for April 28, 2015.[12]

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There were two broad constitutional arguments in favor of same-sex marriage: marriage is a fundamental right under the Due Process Clause, and excluding homosexuals from marriage, or denying them recognition of their legal marriage performed elsewhere violated the Equal Protection Clause. Regarding the Due Process Clause argument, proponents reasoned that marriage is a fundamental right and the government could only limit such a right for compelling reasons. Proponents argued that while the state has compelling reasons to place age restrictions on marriage and prevent close relatives from marrying, the immutable sexual orientation of two individuals was *not* a compelling reason to bar them from marrying. Proponents also often cited

[9] Michigan and Kentucky concern same-sex marriage bans and Ohio, Tennessee, and Kentucky concern the same-sex marriage recognition bans. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
[10] DeBoer v. Snyder, 772 F.3d 388, 399 (6th Cir. 2014). (In Kentucky after the district court's decision, the Attorney General of Kentucky, Jack Conway, announced that he would not appeal Heyburn's order to recognize same-sex marriages performed elsewhere and would allow the ruling to take effect saying if he appealed the decision "I would be defending discrimination. That I will not do." In response, Kentucky's Governor Steve Beshear announced he would hire private attorneys to appeal the decision). See Brett Barrouquere, "Ky. AG Won't Appeal Ruling That State Recognize Same-sex Marriages," LGBTQ Nation, last modified March 4, 2014, accessed March 8, 2016, http://www.lgbtqnation.com/2014/03/ky-wont-appeal-ruling-that-it-recognize-same-sex-marriages-from-other-states/; Brett Barrouquere, "Ky. Governor to Hire Outside Counsel to Appeal Same-sex Marriage Ruling," LGBTQ Nation, last modified March 4, 2014, accessed March 8, 2016, http://www.lgbtqnation.com/2014/03/ky-governor-to-hire-outside-counsel-to-appeal-same-sex-marriage-ruling/.
[11] DeBoer v. Snyder, 772 F.3d 388, 396, 400 (6th Cir. 2014) (The court framed the question as: "Does the Fourteenth Amendment to the United States Constitution prohibit a State from defining marriage as a relationship between one man and one woman?" Additionally, the court argued that *Windsor* did not implicitly or explicitly overrule Baker v. Nelson).
[12] Chicago-Kent College of Law at Illinois Tech, "Obergefell v. Hodges," Oyez, accessed March 8, 2016, https://www.oyez.org/cases/2014/14-556.

the Supreme Court's decisions in *Loving v. Virginia,*[13] *Zablocki v. Redhail,*[14] and *Turner v. Safley,*[15] all of which invalidated restrictions on the fundamental right to marry. Just as the restrictions in these cases were deemed unconstitutional by the Court, proponents of same-sex marriage argued marriage should not be limited to opposite sex couples.[16]

Same-sex marriage supporters also argued laws preventing same-sex couples from marrying constituted discrimination based on sexual orientation.[17] Furthermore, they claimed that because homosexuals share many characteristics the Court considers relevant when extending higher levels of scrutiny for classifications of race and gender -- namely the immutability of the characteristic, a history of past discrimination, and a relative lack of political power -- the laws should be subject to a higher level of judicial scrutiny.[18] Regarding the Equal Protection Clause, same-sex marriage supporters also argued that laws restricting marriage to opposite sex couples constituted sex discrimination in the same way that laws restricting marriage to mixed race couples constituted racial discrimination.[19]

In contrast, opponents of same-sex marriage denied that the fundamental right to marry included a right to marry someone of the same sex.[20] Moreover, they also noted that the Court's fundamental rights jurisprudence looks to tradition to define the scope of such rights, and for thousands of years marriage was limited to opposite-sex couples.[21] They also noted that government restrictions on marriage -- such as setting minimum age requirements and forbidding

[13] Loving v. Virginia, 388 U.S. 1 (1967).
[14] Zablocki v. Redhail, 434 U.S. 374 (1978). (Court struck down a law preventing someone who is delinquent on child support payments to marry)
[15] Turner v. Safley, 482 U.S. 78 (1987). (Court struck down restrictions on a prisoner's right to marry)
[16] Klarman, *From the Closet to the Altar*, 54.
[17] Ibid.,
[18] Idid.,
[19] Ibid.,
[20] Brief for Respondent at 9, Obergefell v. Hodges, 135 S.Ct. 2584 (2015). ("Heightened scrutiny cannot apply because there is no fundamental right to the recognition and protection of same-sex marriage").
[21] Klarman, *From the Closet to the Altar*, 54.

marriage between close family members -- are commonplace and accepted as constitutional.[22] In response to the equal protection argument, gay marriage opponents denied that laws restricting marriage to opposite sex couples constituted sex classifications because the laws treated men and women alike, and therefore such laws did not nurture sexism in the same way that bans on interracial marriage maintained white supremacy.[23] While arguments of both sides in *Obergefell* addressed each of these points, the specific facts of the case and the jurisprudence of the Court determined how the issue was framed for each side.

Counsel for *Obergefell* and the Call for Heightened Scrutiny

Obergefell v. Hodges was unprecedented in many ways. It broke the record for the most briefs ever submitted to the Court -- 148 briefs, 80 for the petitioners and 68 for the respondents.[24] While many of the briefs provided important arguments for the case, 41 of the 80 briefs written supporting the petitioners discussed scrutiny in their argument. Two briefs urged the Court to definitively determine the level of scrutiny for sexual orientation, and 22 asked the Court to apply heightened scrutiny because sexual orientation was a quasi-suspect classification.[25] Arguably the petitioner's own brief gave the most compelling argument for the Court to be explicit about the standard of review, arguing that the recognition bans were

[22] Ibid.,
[23] Klarman, *From the Closet to the Altar*, 54-55. (Interestingly, opponents of same-sex marriage make this argument despite the Court's rejection of the equal application theory to withstand the Equal Protection Clause in *Loving*).
[24] A total 80 briefs were written supporting the petitioners and 68 were written supporting the respondents. See "Obergefell v. Hodges," SCOTUS Blog, accessed March 8, 2016, http://www.scotusblog.com/case-files/cases/obergefell-v-hodges/ and Nina Totenberg, "Record Number Of Amicus Briefs Filed In Same-Sex-Marriage Cases," NPR, last modified April 28, 2015, accessed October 31, 2015, http://www.npr.org/sections/itsallpolitics/2015/04/28/402628280/record-number-of-amicus-briefs-filed-in-same-sex-marriage-cases.
[25] 41 of the briefs explicitly discuss or mention the level of scrutiny, either in terms which standard should be applied or why. More specifically, two of the 41 briefs ask the Court to definitively determine the level of scrutiny for laws that classify on sexual orientation. Four say that although they agree with the petitioners that heightened scrutiny should be used, they argue that the bans cannot pass any level of review. Sixteen briefs called for the Court to use heightened scrutiny because classifications on sexual orientation are suspect or quasi suspect and the LGBT community is a suspect class. Five ask for heightened scrutiny because the laws classify based on sex. Four argue for heightened scrutiny because the laws abridge the fundamental right to marry. Five call for the Court to use rational basis. Five more have certain levels of scrutiny for other reasons.

unconstitutional under *Windsor*; Ohio's refusal to recognize existing marriages of same-sex couples was subject to heightened scrutiny under the Due Process Clause; Ohio's recognition bans triggered heightened Equal Protection scrutiny because they discriminated based on sexual orientation and sex; and Ohio's recognition bans failed any standard of review.[26]

Regarding the first point, the brief claimed that, like DOMA, Ohio's recognition bans have the "design, purpose, and effect" of imposing inequality.[27] Moreover, because the recognition bans target the same narrow class of persons that DOMA did, and were designed to make the marriages of same-sex couples unequal, they should be struck down on the same grounds.[28] Additionally, the recognition bans in Ohio have the practical effect of imposing a stigma on same-sex couples in the state, as DOMA did at the federal level, and therefore are unconstitutional.[29] Furthermore, the brief argued that while *Windsor* struck a *federal* recognition ban on same-sex marriages, the *Windsor* principles apply to the states as well because the ruling "confirmed that federalism interests do not free states to trammel the constitutional marriage rights of the individual."[30] Finally, the brief asserted that Ohio's recognition bans infringe on the sovereignty of *other states* that have legalized same-sex marriage.[31]

Regarding the second point, the brief argued that the recognition bans were subject to heightened scrutiny under the Due Process Clause either because they infringed on the fundamental right to marry, or because there was a protected liberty interest stemming from the importance of marriage in society.[32] It asserted that *Loving* made clear that couples have a

[26] Brief for Petitioner at 20, 32, 38, 49, Obergefell v. Hodges, 135 S.Ct. 2584 (2015). While the brief just mentions Ohio, it is understood that since the cases from the three other states were consolidated with this one that the arguments are the same and Counsel for Obergefell is writing on behalf of all the plaintiffs.
[27] Ibid., at 21
[28] Ibid., at 21 and 30
[29] Ibid., at 24
[30] Ibid., at 30-31
[31] Ibid., at 31
[32] Ibid., at 32

fundamental right to protection and recognition of their validly entered marriages.[33] In *Loving,* the Court held that Virginia's interracial marriage bans, criminalization of out-of-state marriages, and voiding marriages performed elsewhere "deprive[d] the Lovings of *liberty* without due process of law in violation of the Due Process Clause of the Fourteenth Amendment."[34] Therefore, petitioners in *Obergefell* also had a protected liberty interest for the legal respect of their existing marriages.[35] Perhaps most importantly regarding their Due Process Clause argument, counsel asserted:

> As *Loving* illustrates, the fundamental rights of marriage protected by due process are not limited to receiving marriage licenses. The freedom to select the spouse of one's choice receives constitutional protection precisely because of the expectation that this will be the single person with whom one will travel through life, sharing profound intimacy and mutual support through life's good times and bad.[36]

Regarding the third point, counsel argued that the recognition bans triggered heightened equal protection scrutiny because they discriminated on the basis of sexual orientation and sex.[37] Counsel asserted that the Court's decisions in *Romer, Lawrence,* and *Windsor* implicitly rejected the notion that "government discrimination based on sexual orientation can be presumed legitimate and constitutional," even though the Court did so without explicitly determining the standard of review for sexual orientation.[38] Therefore, the brief gave several reasons for why the Court should make explicit a standard of review to use for laws that classify on the basis of sexual orientation.[39] First, determining the level of review is necessary to affirm the equal dignity

[33] Ibid., at 33-34. ("*Loving* not only struck down Virginia's laws prohibiting interracial marriages within the state, but also its statutes denying recognition and criminally punishing such marriages entered outside the state." See Loving v. Virginia, 388 U.S. 1, 4, 12 (1967)).
[34] Ibid., 34 citing U.S. 388 at 12. Emphasis added
[35] Ibid., 35
[36] Ibid., 34
[37] Ibid., 38
[38] Ibid.,
[39] Ibid., 38

of gay people because using only rational basis review brands homosexuals as inferior.[40] Not determining the level of review "tells gay people, their families, and everyone with whom they interact that laws infringing on their personhood should be viewed with no more skepticism than laws regulating packaged milk."[41]

Second, the brief argued that determining the standard of review was appropriate because homosexuals have suffered a history of discrimination; sexual orientation does not bear any relation to the class' ability to contribute to society; sexual orientation is immutable; and homosexuals as a class do not have sufficient political power to protect themselves from the majority.[42] Counsel also argued that the Court should apply heightened scrutiny to Ohio's recognition bans for discriminating on the basis of sex because they restrict the rights of both men and women as individuals based on their sex.[43] In other words, the recognition bans discriminated against Jim Obergefell for being male instead of female, and the opposite was true for the lesbian plaintiffs in the case.

Lastly, counsel argued that even if the Court did not determine the bans and all classifications on sexual orientation warranted heightened scrutiny, the bans could not be upheld even under the rational basis test because they do not bear a rational relationship to an independent and legitimate end.[44] In other words, respondent's arguments do not "provide an independent and legitimate end in itself for the infringement of the rights of same-sex couples and their families;" rather they *describe* how same-sex couples and their families came to have

[40] Ibid., 39-40 citing J.E.B v. Alabama ex rel. T.B., 511 U.S. 127, 142 (1994) (quoting Strauder v. West Virginia, 100 U.S. 303, 308 (1880)).
[41] Ibid., 40 citing United States v. Carolene Products Company, 304 U.S. 144, 152 n.4 (1938).
[42] Ibid., 41. Citing City of Cleburne, Texas v. Cleburne Living Center, Inc, 473 U.S. 432, 440-441 (1985) and Bowen v. Gilliard, 483 U.S. 587, 602 (1987).
[43] Ibid., 48
[44] Ibid., 49-51 citing Romer v. Evans, 517 U.S. 620, 633 (1996).

their rights infringed.[45] None of the state's arguments provided an independent basis for maintaining the discriminatory practice of banning same-sex marriage.[46] Additionally, the state's argument indicated that marriage is merely a "government-run incentive program that channels heterosexuals toward responsible procreation," and completely demeaned married couples -- especially childless couples -- to say that marriage was simply for procreation.[47]

While this thesis focuses primarily on the call for scrutiny of the petitioners in the case, the arguments made by the respondents are important as well. In their brief, the respondents made five main arguments for the constitutionality of the same-sex marriage bans and the recognition bans. First, *Windsor* left marriage recognition to the states because it only involved federal recognition of same-sex marriage and state, not federal, recognition is guaranteed in the Full Faith and Credit Clause of the Constitution.[48] Second, the same-sex marriage bans or the recognition bans do not stem from animus because the state was able to offer other explanations other than prejudice.[49] In other words, the government did not depart from traditional practices and did not target a group for novel burdens.[50] Third, heightened scrutiny did not apply because Ohio's recognition ban did not reference sexual orientation and traditional marriage was not understood to discriminate against same-sex couples.[51] Fourth, Ohio's recognition ban was a reasonable response to those who wanted to evade the same-sex marriage ban by traveling to another state. Finally, counsel also argued that Ohio's recognition laws did not discriminate

[45] Ibid., 51-56. (The State argued there were four legitimate interests to have the recognition bans and the same-sex marriage bans: wanting to leave the question to the democratic process; waiting to see long term consequences of recognizing same-sex marriage; upholding the traditional definition of marriage; and preventing irresponsible procreation. Counsel for Obergefell rejected these arguments).
[46] Ibid., 54 cites Williams v. Illinois 399 U.S. 235, 239 (1970) ("[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack.")
[47] Ibid., 56
[48] Brief for Respondent at 5, Obergefell v. Hodges, 135 S.Ct. 2584 (2015).
[49] Ibid., 7
[50] Ibid.,
[51] Ibid., 9

along suspect lines because they treated each gender equally, and traditional marriage, unlike interracial marriage bans, was not designed to demean any particular sex.[52]

On June 26, 2015, twelve years to the day after *Lawrence v. Texas* and two years to the day after *United States v. Windsor,* the Court announced in a 5-4 decision that the Fourteenth Amendment requires states to license a marriage between two people of the same sex and, by default, to recognize a same-sex marriages performed elsewhere. Immediately following the decision there were celebrations, and same-sex weddings, all over the country. The White House was illuminated with rainbow colors and gay and lesbian couples in America were finally and fully able to make a legal commitment to each other. However, as wonderful as "Marriage Equality Day" was for America and homosexuals, the opinion itself in *Obergefell* left many questions, and calls, unanswered.

Call Denied: Kennedy's Opinion in *Obergefell*

Kennedy's *Obergefell* opinion made four main points: marriage has always been important; marriage has evolved over time; there is a constitutional right to marry that applies with equal force to same-sex couples; and the right to marry is fundamental. Regarding the first two points, Kennedy acknowledged the importance of marriage: "[s]ince the dawn of history, marriage has transformed strangers into relatives, binding families and societies together."[53] Historically, he noted, marriage was understood as a union between a man and a woman, yet the institution "has not stood in isolation from developments in law and society."[54] Even marriage confined to opposite sex couples has evolved and this evolution has involved "not mere

[52] Ibid., 10
[53] Obergefell v. Hodges, 135 S.Ct. 2584, 2594 (2015).
[54] Ibid., 2595

superficial changes. Rather, it has worked deep transformations, affecting aspects of marriage long viewed by many as essential."[55] Moreover, Kennedy argued:

> These news insights have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristics of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and judicial process.[56]

Therefore, while Kennedy acknowledged that respondents, and many "reasonable and sincere people," contend that marriage by its nature is a "gender-differentiated union," same-sex couples seeking to enter into marriage are not trying to devalue the institution.[57] Rather, same-sex couples' desire to enter into marriage reflects their deep respect for the institution of marriage.[58] Moreover, because of their "immutable nature," same-sex marriage is the only option for homosexuals who wish to marry.[59] Additionally, because of the discrimination gays and lesbians have faced in the past, the questions about the rights of homosexuals only became part of the legal discourse in the late twentieth century.[60] Therefore, even though the Court was only considering opposite sex couples when it described the right to marry in precedent cases, and previously "made assumptions defined by the world and time of which it is part," given current understandings of homosexuals as human beings, it is clear that the Fourteenth Amendment requires states to license same-sex marriages.[61]

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[55] Ibid., 2595 emphasis added (For example, marriages used to be arranged by the couple's parents for economic, religious, or political reasons, but now it is understood to be a voluntary decision of the parties. Second, married couples formerly were considered one unit by the state as the wife had no civil or legal recognition other than being dominated by her husband. This too, has dramatically changed over the course of time as women have become more independent, equal members of society with rights).
[56] Ibid., 2596
[57] Ibid., 2594
[58] Ibid., 2594
[59] Ibid., 2594
[60] Ibid., 2596 (Also see chapter one of this thesis).
[61] Ibid., 2598

Regarding the third point, Kennedy argued that the established constitutional right to marry has long been protected under the Due Process Clause. Therefore since cases like *Loving*, *Zablocki*, and *Turner* all dealt with opposite sex couples, the Court must consider *why* marriage has been protected, and if those reasons apply to same-sex couples. Kennedy asserted there are four principles that determine why marriage is protected by the Constitution: personal choice; marriage supports a two-person union unlike any other; marriage is good for children; and marriage is a cornerstone of society.[62]

Regarding the first principle of personal choice, Kennedy argued "the right to personal choice regarding marriage is inherent in the concept of individual autonomy," and decisions concerning marriage and other life choices like contraception, procreation, family relations, and child bearing are some of the most intimate choices an individual can make.[63] Choices like these, Kennedy argued, shape one's destiny and the nature of *marriage* allows two people to make these decisions and find new "freedoms" of spirituality and intimacy together.[64] Furthermore, Kennedy argued "this is true for all persons, whatever their sexual orientation," and there is "dignity in the bond between two men or two women who seek to marry in their autonomy to make such profound choices."[65] The second principle is that marriage supports a two-person union so unique and important to the two persons involved:

> Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live, there will be someone to care for the other.[66]

The third principle is that marriage "safeguards children and families" in a unique way and leads to a better understanding of rights like childbearing, procreation, and education.[67]

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[62] Ibid., 2599-2601
[63] Ibid., 2599
[64] Ibid., 2599
[65] Ibid., 2599
[66] Ibid., 2599

Kennedy noted that the Court has acknowledged marriage's connection to other rights and has held that all of the varied rights unified as a whole are central to the protected liberty interest of the Due Process Clause.[68] Moreover, while marriage provides *material* benefits to children, marriage also provides other profound benefits such as understanding the integrity and closeness of their family and its concord with their community; affording permanency and stability; and offering loving and nurturing homes.[69] This idea is supported by the fact, Kennedy asserted, that most states allow gays and lesbians to adopt children and there is agreement -- between petitioners, respondents, and the law -- that same-sex couples provide loving and supportive homes to children, whether biological or adopted.[70] Therefore:

> [E]xcluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.[71]

However, he also noted that childbearing is only one of the many aspects of the constitutional right to marry, and that right is not diluted or less meaningful for couples who do not or cannot have children.[72]

Finally, Kennedy argued marriage is protected under the constitution because the Court and the Nation have made it clear that marriage is a cornerstone of our society. Even as marriage has changed and evolved over time, marriage has remained "a building block of our national

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[67] Ibid., 2599
[68] Ibid., 2599 quoting Zablocki v. Redhail, 434 U.S., at 384
[69] Ibid., 2599
[70] Ibid., 2599 (As of March 31, 2016 same-sex couples are allowed to adopt in all 50 states.) See Mollie Reilly, "Same-Sex Couples Can Now Adopt Children in All 50 States," The Huffington Post, last modified March 31, 2016, accessed April 18, 2016, http://www.huffingtonpost.com/entry/mississippi-same-sex-adoption_us_56fdb1a3e4b083f5c607567f.
[71] Ibid., 2600
[72] Ibid., 2601 ("An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State").

community."[73] Therefore, marriage is not just a relationship between the couple that vows to support one another, but with that vow, society also pledges to support the couple, "offering symbolic recognition and material benefits to protect and nourish the union."[74] Furthermore while the benefits for married couples vary from state to state, all states make marriage the cornerstone for "expanding governmental rights, benefits, and responsibilities."[75] Therefore, "by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage" and are treated as second class citizens.[76]

In outlining the four reasons why the Constitution protects marriage, Kennedy then asserted that the principles apply to same-sex couples just as they do opposite sex couples and excluding same-sex couples from marriage harms same-sex couples "in more than just material burdens."[77] More specifically:

> Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.[78]

Therefore, because limiting marriage to opposite sex couples is inconsistent with the central meaning of the fundamental right to marry, there must be a recognition that laws "excluding same-sex couples from their right to marry imposes a stigma and injury of the kind

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[73] Ibid., 2601
[74] Ibid.,
[75] Ibid., 2601 ("Taxation; inheritance and property rights; rules of intestate[3] succession; spousal privilege in the law of evidence; hospital access; medical decision making authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules.")
[76] Ibid., 2601
[77] Ibid., 2601
[78] Ibid., 2602

prohibited" by the Constitution.[79] Kennedy dismissed respondent's argument that legalizing same-sex marriage would create a *new* right as "inconsistent with the approach the Court has used in discussing other fundamental rights, including marriage and intimacy."[80]

> *Loving* did not ask about a 'right to interracial marriage,' *Turner* did not ask about a 'right of inmates to marry,' and *Zablocki* did not ask about a 'right of fathers with unpaid child support duties to marry.' Rather, each case inquired about the right to marry in its *comprehensive sense,* asking if there was a sufficient justification for excluding the relevant class from the right. . .[Furthermore], if rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected this approach, both respect to the right to marry and the rights of gays and lesbians.[81]

In other words, just because something has always been one way, does not make it constitutional. The fact that many people believe same-sex marriage is wrong makes no difference:

> [W]hen that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.[82]

In terms of the constitutionality of the same-sex marriage bans, Kennedy asserted the laws denied same-sex couples the liberty protected by the Due Process Clause of the Fifth Amendment and equal protection of the laws guaranteed by the Equal Protection Clause. Kennedy argued that the two clauses are connected and their liberty and equal protection concepts lead to stronger understanding of the other.[83] This idea of intertwining the Equal Protection Clause and Due Process Clause were used in Kennedy's opinion in *Lawrence,* and he then solidified that relationship between the two in *Obergefell*. Moreover, he noted that *Loving*

[79] Ibid., 2602
[80] Ibid., 2602
[81] Ibid., 2602 see Loving v. Virginia 388 U.S., at 12 and Lawrence v. Texas 539 U.S., at 566-567.
[82] Ibid., 2602
[83] Ibid., 2603

declared bans on interracial marriage invalid because of unequal treatment of interracial couples, and because the bans were "so subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law."[84] Kennedy then asserted that cases like *Loving* and *Zablocki* reveal how "new insights and and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."[85] In other words, as society changes, so do the norms that are protected under the Equal Protection Clause, and while same-sex marriage was not always recognized as needing equal protection, it is now.[86] Kennedy wrote:

> It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. . .These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied them.[87]

Kennedy therefore reasons that same-sex marriage bans are unconstitutional not because they violate the Equal Protection Clause and treat same-sex couples differently than opposite sex couples simply because of their sexual orientation, but because there is a fundamental right to marry for all people inherent in the Due Process Clause.

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[84] Ibid., 2603 see Loving U.S. 388., at 12
[85] Ibid., 2603
[86] Ibid., 2604 (Justice Kennedy gives examples of how the Court invoked equal protection principles to invalidate laws imposing sex based inequality on marriage) See, e.g., Kirchberg v. Feenstra, 450 U. S. 455 (1981); Wengler v. Druggists Mut. Ins. Co., 446 U. S. 142 (1980); Califano v. Westcott, 443 U. S. 76 (1979); Orr v. Orr, 440 U. S. 268 (1979); Califano v. Goldfarb, 430 U. S. 199 (1977) (plurality opinion); Weinberger v. Wiesenfeld, 420 U. S. 636 (1975); Frontiero v. Richardson, 411 U. S. 677 (1973).
[87] Ibid., 2604-2605

Finally, Kennedy addressed the most substantial arguments of the respondents. He dismissed their request for the Court to wait until there had been a sufficient democratic discourse on same-sex marriage by noting that there "have been referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings. There has been extensive litigation in state and federal courts," as well as 148 briefs submitted pointing that substantial attention has been given to the question of same-sex marriage.[88] Additionally, while the democratic process should be used for change in most circumstances, the Constitution says that process is appropriate "so long as that process does not abridge fundamental rights."[89] Clearly, the democratic process regarding same-sex marriage has been used to deny and abridge same-sex couples their fundamental right to marry, so it is appropriate for the Court to rule in this case. Furthermore, it makes no difference *where* the issue of same-sex marriage is in the democratic process, but rather what matters is that the Constitution protects the right of same-sex couples to marry. Moreover, the Court should be wary of leaving issues of fundamental rights to the democratic process because, as in *Bowers,* the Court did so and caused gays and lesbians "pain and humiliation."[90] Moreover, even though *Bowers* was overruled in *Lawrence,* "the substantial effects of these injuries no doubt lingered long after *Bowers* was overruled" because "[d]ignitary wounds cannot always be healed with the stroke of a pen."[91] Finally, Kennedy warns of the effects if the Court were to uphold the Sixth Circuit's decision:

> Were the Court to uphold the challenged laws as constitutional, it would teach the Nation that these laws are in accord with our society's most basic compact. Were the Court to stay its hand to allow slower, case-by-case determination of the required availability of

[88] Ibid., 2605
[89] Ibid., 2605
[90] Ibid., 2606
[91] Ibid., 2606

specific public benefits to same-sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage.[92]

Kennedy also rejected the claim that the institution of marriage would be harmed if same-sex marriage was legalized. While respondents argued that allowing same-sex marriage would lead to fewer opposite sex marriages because same-sex marriage would sever "the connection between natural procreation and marriage," Kennedy simply replied that "it is unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so."[93]

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Though the decision as a whole is much to be celebrated as a step in the right direction for equality in America, Justice Kennedy's opinion, below the surface, is strikingly unclear for gay rights in a broader context. As in his previous opinions, Kennedy chose not to determine the standard of review for sexual orientation. He refused to determine a clear standard even though he wrote about the history of discrimination against homosexuals; referenced the immutability of sexual orientation; and the minority status of homosexuals. Even though the briefs for petitioners and twenty-two friends of the Court called for the Court to explicitly determine the level of scrutiny for classifications on the basis of sexual orientation, Kennedy all but ignored their call.[94] Moreover, although he asserted that marriage is a fundamental right, he did not follow the

[92] Ibid,. 2606
[93] Ibid., 2607
[94] Interestingly, in his opinion, Justice Kennedy referenced just seven of the 148 briefs written, but did not include the petitioner's brief. (See Obergefell at 2596 citing Brief for Organization of American Historians, as Merits Curiae Supporting Petitioners, 5-28; Ibid., at 2596; citing Brief for American Psychological Association et al, as Merits Curiae Supporting Petitioners, 7-17; Ibid., at 2600, citing Brief for Scholars of the Constitutional Rights of Children, 22-27; Ibid, 2600 citing Brief for Gary J. Gates, as Merits Curiae Supporting Petitioners, 4; Ibid., at 2601, Brief for the United States, as Merits Curiae Supporting Petitioners 6-9; Ibid., 2601 Brief for the American Bar Association, as Merits Curiae Supporting Petitioners, 8-29; Ibid., at 2602, Brief for Respondent in No. 12-556 as Merits Curiae Supporting Respondents, 8. See Nina Totenberg, "Record Number Of Amicus Briefs Filed In Same-Sex-Marriage Cases," NPR, last modified April 28, 2015, accessed October 31, 2015, http://www.npr.org/sections/itsallpolitics/2015/04/28/402628280/record-number-of-amicus-briefs-filed-in-same-sex-marriage-cases.

established reasoning that the Court uses when looking at the abridgment of fundamental rights.[95]

Instead, Kennedy focused on the intertwined nature of the Due Process Clause and Equal Protection Clause, the fundamental right to marry, and the evolution and expansion of what the Constitution directs. Regarding the first point, several scholars have written at length about what *Obergefell* achieved. In the words of Laurence Tribe -- arguably one of the most well respected constitutional law scholars:

> [T]hat *Obergefell's* chief jurisprudential achievement is to have tightly wound the double helix of Due Process and Equal Protection into a doctrine of *equal dignity* -- and to have located that doctrine in a tradition of constitutional interpretation as an exercise of public education. Equal dignity, a concept with a robust doctrinal pedigree, does not simply look back to purposeful past subordination, but rather lays the groundwork for an ongoing dialogue about fundamental rights and the meaning of equality.[96]

In doing so, however, Kennedy departed from other cases regarding the fundamental right to marry and did not apply the Equal Protection Clause and Due Process Clause in the same way. For example, "*Loving* generally treated the liberty and equality claims as parallel rather than intertwined," whereas *Obergefell* viewed them as connected.[97] Regarding the second point about fundamental rights, Kennedy's emphasis on that point was not surprising. As Tribe notes:

> The idea that all individuals are deserving in equal measure of personal autonomy and freedom to "define their own concept of existence" instead of having their identity and social role defined by the state -- has animated Kennedy's most memorable decisions about the fundamental rights protected by the Constitution, from *Planned Parenthood v. Casey* to *Parents Involved in Schools v. Seattle.*[98]

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[95] Laws that restrict a fundamental right are also subject to strict scrutiny. See Garrett Epps, "Gay Marriage Gets Its Day in Court," The Atlantic, last modified April 27, 2015, accessed February 21, 2016, http://www.theatlantic.com/politics/archive/2015/04/gay-marriage-gets-its-day-in-court/391487/.

[96] Laurence H. Tribe, "Equal Dignity: Speaking Its Name," *Harvard Law Review* 129, no. 1 (November 10, 2015): 17, accessed November 22, 2015, http://harvardlawreview.org/2015/11/equal-dignity-speaking-its-name/.

[97] Kenji Yoshino, "New Birth of Freedom?: Obergefell v. Hodges," *Harvard Law Review* 129, no. 1 (November 10, 2015): 172, accessed November 22, 2015, http://harvardlawreview.org/2015/11/a-new-birth-of-freedom-obergefell-v-hodges/.

[98] Tribe, "Equal Dignity: Speaking Its Name," 22.

In fact, Kennedy even hinted during the oral argument for *Obergefell* that he was inclined to focus more on the fundamental right to marry than the guarantee of equal protection for homosexuals in America. At the very end of the Solicitor General's argument in support of the petitioners in the case, Kennedy asked him how a precedent case *Washington v. Glucksberg* required the Court to define fundamental rights in a narrow way. Solicitor General Verrilli answered:

> We do recognize that there's a profound connection between liberty and equality, but the United States has advanced only an equal protection argument. We haven't made the fundamental rights argument under *Glucksberg*. . .And therefore, I'm not sure it would be appropriate for me not having briefed it to comment on that.[99]

Kennedy followed up asking if Verrilli could explain why the United States did not make a fundamental rights argument. Verrilli answered:

> [T]his issue really sounds in equal protection, as we understand it, because the question is equal participation in a State-conferred status and institution. . .[and] what the Respondents are ultimately saying to the Court is that with respect to marriage, they are not ready yet. And yes, gay and lesbian couples can live openly in society, and yes, they can raise children. Yes, they can participate fully as members of their community. Marriage, though, not yet. Leave that to be worked out later. . .But what these gay and lesbian couples are doing is laying claim to the promise of the Fourteenth Amendment now. And it is emphatically the duty of this Court, in this case, as it was in *Lawrence*, to decide what the Fourteenth Amendment requires. And what I would suggest is that in a world in which gay and lesbian couples live openly as our neighbors, they raise their children side by side with the rest of us, they contribute fully as members of the community, that it is simply untenable -- untenable to suggest that they can be denied the right of equal participation in an institution of marriage, or that they can be required to wait until the majority decides that it is ready to treat gay and lesbian people as equals. Gay and lesbian people are equal. They deserve the equal protection of the laws, and they deserve it now. Thank you.[100]

Finally, Kennedy's opinion also spoke to the evolution of equality and how understandings of equal treatment may change over time. Tribe addresses this point as well:

> [A] too rarely noted aspect of Justice Kennedy's opinions in this realm, beginning in *Romer* and *Lawrence* and culminating in *Obergefell,* is the belief that the Constitution is

[99] See Transcript of Oral Argument on Question 1, at 38-39
[100] Ibid.,

> written and designed to shed light on society's evolving experience, framing windows through which to view and asses that experience, and to thereby educate us in how we might proceed to form an ever more perfect union.[101]

Kenji Yoshino, a Constitutional Law Professor at New York University, also notes Kennedy's understanding of the evolution of equality and how it is rooted in the Constitution:

> **[**T]he problem of the blindness of each generation, the modesty of the framers in recognizing this blindness, their use of abstraction as a way to bequeath the question of liberty to future generations, and the attendant responsibility of constitutional interpreters in each generation to take up that legacy.[102]

For all its eloquence, Justice Kennedy's *Obergefell* opinion left homosexuals with more questions than answers in areas *other* than marriage. Legal scholars and interest groups on both sides of the debate attacked Kennedy's opinion for its lack of clarity and transparency. Among those who applauded the *outcome* of the decision, there were many who denounced Kennedy for once again ruling in favor of gay rights without determining the standard of review. Opponents of the *outcome* inside and outside the Supreme Court attacked Kennedy for pulling his reasoning and arguments out of thin air. They argued the concept of liberty and dignity as they applied to homosexual rights were created by Kennedy and not based in the Constitution.

[101] Tribe, "Equal Dignity: Speaking Its Name," 27.
[102] Yoshino, "New Birth of Freedom?," 163.

CHAPTER IV

Criticisms of Kennedy's Opinion: In Outcome and Reasoning

> If you are among the many Americans -- of whatever sexual orientation -- who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it. -Chief Justice Roberts, *Obergefell v. Hodges* Dissent.

The Dissenters on the Court

Since the *Obergefell v. Hodges* decision was announced, there has been much debate and discussion regarding Kennedy's opinion. While some groups and legal scholars praise the decision for both the reasoning Kennedy used and the outcome, most have criticized the reasoning, the outcome, or both.

Perhaps the most vocal adversaries of the reasoning and outcome of the decision are the four dissenting Justices on the Court. The dissenting Justices and their supporters argue that the *Obergefell* opinion exemplified judicial activism, created a new right, misinterpreted the meaning of liberty, reverted to an unprincipled expansive take on fundamental rights and due process used in *Lochner v. New York*,[315] and ignored the Court's traditional equal protection analysis. The Justices also raise concerns about the potential implications of the opinion on religious liberty and polygamy. While their claims hold some value, the main point of each of them was to provide a basis, other than discrimination or animus, to prevent homosexuals from accessing their fundamental right to marry. This section evaluates and analyzes the arguments

[315] Lochner v. New York, 198 U.S. 45 (1905); ("Described as the bête noire of substantive due process in which the Court struck down laws setting maximum hours and minimum wages and other forms of purely economic regulation on bakers."). Tribe, "Equal Dignity: Speaking Its Name," 27.

made by the Justices, focusing mainly on the dissenting opinion of Chief Justice Roberts, who wrote the most extensive and, in some ways, critical dissent.

One common theme in the *Obergefell* dissents is the discussion of how the decision robs the American people and the state legislatures of the opportunity to resolve the issue of same-sex marriage.[316] Each of the dissenting Justices claimed that the Court's decision in *Obergefell* was a blatant example of judicial activism, and that "commitment to democracy renders the Court's intervention in the marriage wars fundamentally illegitimate."[317] This argument is not surprising because Justices on both sides of the ideological aisle often accuse their colleagues of engaging in judicial activism when writing about decisions with which they disagree.

On the surface, the dissenting Justices' claims hold clout, particularly given that Justice Kennedy stressed the importance of states having the power to determine their own marriage laws to invalidate DOMA in *Windsor*. However, Kennedy wrote in his opinion that sometimes the Court has to remove certain topics from the will of democratic majorities in order to establish them as legal principles to be applied by the Courts.[318] Additionally, as Laurence Tribe writes, Kennedy reminds his critics that, "for all its presumptive virtues, democracy has its limits," and people do not have to wait for legislative action to assert a fundamental right.[319] Tribe also argues that the structures of federalism protect individual rights, and in his past decisions Justice Kennedy

> [H]as made it clear that he views the sovereignty of the states as important much less as an *end in itself* than as a *means* to the end of protecting the liberties of those who reside

[316] Obergefell, 135 S. Ct. 2584 (2015). See id at 2611-12 (Roberts, C.J., dissenting); id. At 2626-27 (Scalia, J., dissenting); id. At 2631-32 (Thomas, J., dissenting); id. At 2640-41 (Alito, J., dissenting).
[317] Tribe, "Equal Dignity: Speaking Its Name," 25.
[318] Ibid., 25-26. Citing Obergefell, at 2606 (The idea of the Constitution is "to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."). Id at 2606 (quoting W. Va. State Bd. Of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).
[319] Ibid., 25. See Obergefell 2605 (majority opinion).

> in those states -- both their *negative* liberties from oppressive regulation and their *positive* liberties to take part in politically accountable self government.[320]

In other words, Kennedy believes states have sovereignty not just for the sake of the separation of powers, but because sovereign states are a *means* by which individuals living in those states have their liberties protected. Tribe further argues that for Kennedy "the Constitution's implicit division of powers between the national government and the States exists principally to protect personal liberty and equality."[321] Consequently, Justice Kennedy's proposition in *Obergefell,* "is thus fully consistent with the more fundamental demand that *no* level of government exercise its power in a manner that, however rooted in tradition, ends up depriving individuals of those rights."[322]

Tribe further argues that this fundamental demand was made clear in "both public dialogue and lower court decisions in the wake of *Windsor*" as states began to see that they were depriving individuals of liberty and equality rights by prohibiting same-sex marriage.[323] Therefore, in writing *Obergefell* Kennedy did not need to root his analysis in federalism the way he did in *Windsor* because he recognized that the courts and the people had determined no level of government can take away the liberty and equality of homosexuals.[324]

In his dissent, Chief Justice Roberts further argued that the Court should have practiced "judicial restraint" and not decided *Obergefell* because proponents of same-sex marriage lost the "opportunity to win the true acceptance that comes from persuading their fellow citizens of the justice of their cause."[325] In other words, Roberts asserted that the Court's decision will result in resentment of opponents of same-sex marriage because "[s]tealing this issue from the people will

[320] Ibid., 22 footnote 46 citing Bond v. United States, 131 S. Ct. 2355, 2364 (2011).
[321] Ibid., 28-29 citing 131 S. Ct. 2355, 2364 (2011).
[322] Ibid.,
[323] Ibid., 29
[324] Ibid., 29
[325] Obergefell, 135 S. Ct. 2584, 2625 (2015) (Roberts, C.J., dissenting)

for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept."[326]

While Roberts is correct in stating that the ruling would make people upset,[327] to argue that is a reason to let the states continue to deny same-sex couples their fundamental rights is misguided.[328] For example, in the short term after *Brown v. Board of Education* (1954), racial progress in the South was delayed and "radicalized, southern racial politics" allowed for the advancement of the careers of extreme segregationists like Bull Connor and George Wallace.[329] However, those possible implications were not a justification for the Supreme Court to step away from the case and decide that individual states could determine whether they wanted to integrate schools or not. As there was after *Brown,* and slightly less so after *Loving,* there has been and will continue to be backlash regarding the *Obergefell* ruling. However, all three cases determined that the Constitution demands full equality under the law and, implicit in *Obergefell,* the Court determined denying same-sex couples anything but marriage equal to that of opposite sex couples constituted the "separate but equal" doctrine overruled in *Brown.* Today, *Brown* and *Loving* are regarded as some of the best decisions the Supreme Court has ever produced, and both were decided independently of the negative consequences they would have on the South or

[326] Ibid., at 2612 (Roberts, C.J,. Dissenting)
[327] Klarman, *From the Closet to the Altar*, xx. ("When the Court intervenes to defend a minority position or even to resolve an issue that divides the country down the middle, its decisions can generate political backlash, especially when the losers are intensely committed, politically organized, and geographically concentrated.").
[328] Ibid., xiii ("Several factors influence whether court decisions generate backlash, including public opinion on the underlying issue, the relative intensity of preference on the two sides of the issue, and the ease with which a particular Court ruling can be circumvented or defied. An analysis of these factors suggests that a broad marriage equality ruling in *Hollingsworth* would have ignited considerably less backlash than *Brown v. Board of Education* sparked among white southerners in 1954 or that *Roe v. Wad*e generated among right-to-lifers in 1973.").
[329] Ibid., xv ("For a full decade after Brown, not a single school desegregation suit was brought in Mississippi because the threat and reality of physical violence deterred prospective litigants. When the first such suit finally was filed in 1963, the lead plaintiff, Medgar Evers, was assassinated within a few months. Similarly violence against abortion clinics and the murder of several doctors who performed abortions has deterred exercise of the constitutional right articulated in Roe v. Wade."). See Michael J. Klarman, *Brown V. Board of Education and the Civil Rights Movement: Abridged Edition of from Jim Crow to Civil Rights : the Supreme Court and the Struggle for Racial Equality* (Oxford: Oxford University Press, 2007), 149-174.

White Supremacy. Therefore, while the "we should wait and see" argument is not surprising, it does not make a convincing case for the denial of a fundamental right.

The second argument that the dissenting Justices make is that in its decision, the Court created a "new right" that was neither rooted in Court precedent or the Constitution. While Kennedy asserted that same-sex marriage is part of the fundamental right to marry in its comprehensive sense, Roberts argues the "fundamental right to marry does not include the right to make a State change its definition of marriage,"[330] and "[n]either the petitioners nor the majority cites a single case or other legal source providing any basis for such a constitutional right. None exists, and that is enough to foreclose their claim."[331] Therefore, he frames it in a way that supports the idea that the legislatures, not the Court, should decide who can access the fundamental right to marry. Justice Alito, also argues that the Court "created" a new right, and argues "[t]he Constitution says nothing about a right to same-sex marriage."[332]

While framing a question in a certain way can determine the answer, Roberts and Alito misconstrued the petitioners' argument. Petitioners were not claiming they had a right to force the states to change their marriage laws, but that they had a right, as citizens protected under the law, to access their fundamental right to marry just like opposite sex couples. However, even if, as Roberts argues, petitioners *were* seeking a right to make the states change their definitions, the Court's precedent supports that. In *Loving,* the Court forced the states with interracial marriage bans to change their definitions of marriage to include unions between interracial couples. Previously, Virginia and fifteen other states defined marriage as a union between a man and a woman of the same race. For the states that had to change their laws as a result of *Loving,* the

[330] Obergefell, 2611 (Roberts, C.J,. Dissenting)
[331] Ibid., at 2619
[332] Ibid., at 2640 (Alito, J,. Dissenting)

institution of marriage was changed significantly, and was even threatened as an institution.[333] Previously, those in support of the interracial marriage bans argued that marriage would be ruined if interracial couples were allowed to marry, that the human race would suffer if mixed race couples were able to reproduce,[334] and that interracial marriage was against biblical teaching.[335]

Roberts distinguishes other precedent marriage cases by insisting that none of the laws at issue in *Loving, Zablocki,* or *Turner* tried to change the 'core' definition of marriage as a union between a man and a woman.[336] He distinguishes *Loving* and *Obergefell* specifically, arguing that forcing the legalization of interracial marriage did not change the "core" institution of marriage any more than integrating schools changed schools after *Brown*.[337] While integrating schools in *Brown* did not change the physicality of schools, for some their educational experience was completely changed by the *Brown* decision.[338] As mentioned above, there was significant backlash, including backlash in the name of religion, from the *Brown* decision even though schools, as physical places where children are educated, did not change.[339]

Furthermore, *Loving* and *Obergefell* had less of an impact on marriage than *Brown* did on schools. Marriages between people of the same race before and after *Loving* were not affected by

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[333] In the 1959 lower court decision that preceded *Loving* and upheld interracial marriage bans, the judge writing for the majority stated: "[a]lmighty God created the races white, black, yellow, malay, and red and he placed them on separate continents. And, but for the interference with his arrangement, there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix." See Loving v. Virginia, 388 U.S. 1, 3 (1967).

[334] ("Purity of race is a gift of God. . .And God, in his infinite wisdom, has so ordained it that when man destroys his racial purity, it can never be redeemed," furthermore, "miscegenation and amalgamation are sins of man in direct defiance with the will of God.") Theodore G. Bilbo, *Take Your Choice: Separation or Mongrelization* (1947), 109, quoted in Curtis, "A Unique Religious Exemption," 189-190.

[335] In 1960, Ross Barnett became Governor of Mississippi in a landslide after claiming "the good Lord was the original segregationist." See Millhiser, "When 'Religious Liberty' Was Used," Think Progress.

[336] Obergefell, 2614-15 (Roberts, C.J,. Dissenting)

[337] Ibid., at 2619 (Roberts, C.J,. Dissenting)

[338] Klarman, *Brown v. Board of Education*, 154. ("Senator James Eastland of Mississippi announced, 'The South will not abide by or obey this legislative decision by a political court,' and Mississippi officials warned they would abolish public education before integrating.")

[339] Ibid.,

the decision at all. Similarly, opposite sex marriages before and after *Obergefell* will not be, and have not been, changed at all by the decision. In contrast, *Brown* affected black and white children nationwide who were previously in segregated schools. In fact, *Brown* reconfigured social relations throughout the South and states closed public schools rather than integrate them.[340] In other words, opening marriage to interracial couples and same-sex couples only affects interracial couples and same-sex couples who decide to get married. The existing or future marriages that do not fall within those categories are not affected in the same way that white and black children were both affected by *Brown.*

Both Roberts and Alito support their claim that same-sex marriage is not included in the fundamental right to marry by appealing to tradition, arguing that the traditional, or definitional, understanding of marriage has always been linked to procreation. Justice Alito specifically argues that, the Court's "understanding of marriage, which focuses almost entirely on the happiness of persons who choose to marry, is shared by many people today, but it is not the traditional one," and that tradition confirms that the fundamental right to marry only involves opposite sex couples who have the potential to procreate.[341] Roberts also argues that because humans must procreate to survive, and children do better if their parents stay together, "sexual relations that can lead to procreation should only occur between a man and a woman committed to a lasting bond."[342]

While it is true that historically people were married to have children or to cement political alliances, to say that is the only reason people get married today threatens to insult all the married couples who choose not to, or cannot, have children. Additionally, as Tribe notes:

[340] Ibid., 149-174
[341] Obergefell, at 2641 (Alito, J., dissenting).
[342] Ibid., at 2613 (Roberts., C.J., dissenting).

> In *Obergefell,* Justice Kennedy's discussion of the history of marriage is manifestly structured not just to respond in legal terms to the dissenters' claims that the institution has had a fixed meaning for millennia, but also to make ordinary people focus more closely on how the evolution of gender roles, among many other developments, has silently but assuredly transformed the institution's meaning.[343]

Therefore, Kennedy argues that allowing same-sex couples to marry does not redefine marriage. Additionally, excluding groups of people from accessing a fundamental right because they have traditionally been excluded is not a good enough justification for the exclusion.[344] While tradition is important in determining who has access to fundamental rights, it is not the only, or most important factor. Furthermore, understanding that all fundamental rights evolve, and the fundamental right to marry specifically has evolved, does not mean, as Justice Scalia claims in his dissent, that every state violated the Constitution for 135 years between the Fourteenth Amendment's ratification, and Massachusetts legalizing same-sex marriage in 2003.[345] Nor does it mean that anyone who ever thought same-sex marriage was implausible, wrong, or unnecessary is an ignorant bigot.[346] Rather, as Tribe writes, Kennedy understands that:

> [A] governmental practice that limits the options available to members of a particular group need not have been *deliberately* designed to harm the excluded group if its oppressive and unjustified effects have become clear in light of current experience and understanding.[347]

In other words, whether the limiting practice is deliberate or not, what matters is that as time goes on, those limits are reconsidered, and removed if necessary. That is why the Framers included the Ninth Amendment, which states: "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[348] The Framers

[343] Tribe, "Equal Dignity: Speaking Its Name," 24.
[344] Ibid., 19.
[345] Obergefell, at 2629 (Scalia, J., dissenting).
[346] Ibid., at 2630
[347] Tribe, "Equal Dignity: Speaking Its Name," 19. Citing Obergefell, at 2598 (majority opinion).
[348] U.S. Const. amend. IX, cited in Yoshino, "New Birth of Freedom?," 148. Footnote 12

understood, as Kennedy does, that as time goes on, human understanding of rights, equality, and inclusivity change and those changes need to be accounted for.

Even though the dissenting Justices may detest this "evolution" of rights, it is not unprecedented, and not something that Kennedy created out of thin air. For example, the right to vote was once a right that only white, land owning males had access to.[349] In 1870, the Fifteenth Amendment gave former slaves the right to vote, and in 1920, the Nineteenth Amendment gave women the right to vote.[350] Therefore, to say that marriage, as a fundamental right, cannot be expanded because, as a matter of history, it has always been understood in one way cannot be supported with the development of other fundamental rights.

Though the fundamental right to marry differs from the fundamental right to vote in that it was expanded by the Court, not Constitutional Amendments, it is not unprecedented for the Supreme Court to expand or establish certain fundamental rights that are not explicitly included in the Constitution.[351] For example, the Court has recognized the right to direct the education and upbringing of one's children;[352] the right to procreate;[353] the right to bodily integrity;[354] the right to privacy from government intrusion;[355] and the right to sexual intimacy:[356]

> Thus the line of cases Justice Kennedy invokes conspicuously protects rights resting not on any particular clause, like the Freedom of Speech Clause or the Free Exercise of Religion Clause, but instead on the dignity and autonomy of the individual standing

[349] "U.S. Voting Rights Timeline," KQED, accessed March 27, 2016, http://www.kqed.org/assets/pdf/education/digitalmedia/us-voting-rights-timeline.pdf.
[350] Ibid.,
[351] Yoshino, "New Birth of Freedom?," 149.
[352] See Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) and Meyer v. Nebraska, 262 U.S. 390, 400 (1932).
[353] Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942).
[354] See Rochin v. California, 342 U.S. 165, 172-73 (1952).
[355] The fundamental right to privacy in particular, was first established in *Griswold,* which held that the fundamental right to privacy allowed married couples to use contraception. The Court then determined in *Eisenstadt* that the fundamental right to privacy articulated in *Griswold* also applied to non-married individuals. Therefore, the right to privacy from government intervention from using contraceptives was not just for married couples, but for everyone. The right to privacy was expanded further in *Roe* with the right to bear or beget a child. See Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965), Eisenstadt v. Baird, 405 U.S. 438, 443 (1972), and Roe v. Wade, 410 U.S. 113, 153 (1973).
[356] Lawrence v. Texas, 539 U.S. 558, 578 (2003).

> against the forces of coerced conformity -- on principles *underlying* the written Constitution but nowhere expressly articulated in its text.[357]

Furthermore, while the Court is able to expand and establish rights over time, it has used two approaches "for shaping the middle ground of calling for the creation of unenumerated rights and avoiding making everything a right."[358] First, an open ended common law approach associated with Harlan's dissent in *Poe v. Ullman*[359] and second, a more closed-ended formulaic approach associated with the majority in *Washington v. Glucksberg.*[360] As Yoshino notes:

> Obergefell did not categorically resolve the ongoing conflict between the two models, but it heavily favored *Poe.* . .Kennedy also made sure to say that the *Glucksberg* approach "may have been appropriate" in certain contexts, but not in discussing fundamental rights of marriage and intimacy. By doing that he presents marriage and intimacy as exemplary rather than exhaustive instances of rights for which the *Glucksberg* methodology would not obtain.[361]

The third point of criticism of Kennedy in the dissenting opinions is his invocation of the rights to "liberty" and "dignity." As Justice Thomas argues in his dissent, "[s]ince well before 1787, liberty has been understood as freedom from government action, not entitlement to government benefits," and since the petitioners have not suffered from government action, they have not been deprived of liberty.[362] Thomas further reasons that when reading the history of the

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[357] Tribe, "Equal Dignity: Speaking Its Name," 26.
[358] Scholars Yoshino and Tribe both discuss how Kennedy's opinion reworked those approaches, favoring the one used in *Poe,* however this paper will not discuss how Kennedy's opinion ultimately revamped the determination of fundamental rights or the *Poe* and *Glucksberg* approaches in depth.
[359] Ibid., 149 ("*Poe* concerned a criminal ban on the use of contraception. The Court dodged the issue of whether the law violated the constitution by deeming the case non-justifiable on standing and ripeness grounds. In dissent, Harlan maintained that the Court should have reached the merits, and used the occasion to articulate standards for when a right could be deemed protected under the due process guarantees. . .Harlan outlined a balancing methodology that weighed individual liberties against governmental interests in a reasoned manner. Such an approach always occurred against the back drop of tradition, but was not shackled to the past, not least because tradition itself was a living thing."). Citing Poe v. Ullman, 367 U.S. 497, 522-24 (1961). (Harlan, J., dissenting).
[360] Ibid., 150 (The Court observed in order to be recognized as a due process liberty, a right had to be (1) deeply rooted in this Nation's history and tradition, (2) and implicit in the concept of ordered liberty, and (3) the fundamental liberty interest had to be carefully described. The Court also implied that they were more open to recognizing negative "freedom from" rights as opposed to positive "freedom to" rights). Citing Washington v. Glucksberg, 521 U.S. 702, 720-22 (1997).
[361] Yoshino, "New Birth of Freedom?," 149 and 166.
[362] Obergefell, at 2631-32 (Thomas, J., dissenting).

Due Process Clause, "it is hard to see how the 'liberty' protected by the Clause could be interpreted to include anything broader than freedom from physical restraint."[363] Justice Thomas, like Roberts, frames the issue as petitioners trying to force their way into marriage, rather than the state barring homosexuals from accessing a fundamental right simply because they are homosexual.

For Thomas, the government banning same-sex couples from marrying, or banning the recognition of their marriages, does not represent government abridgment. Rather, Thomas contends that since the states allow same-sex couples to enter into relationships other than marriage, engage in sexual intimacy, make vows in public ceremonies, and raise children without issue, they have not been deprived of liberty.[364] Additionally, he adds the states have not prevented "petitioners from approximating a number of incidents of marriage through private legal means, such as wills, trusts, and power of attorney," and therefore have not deprived them of liberty.[365]

However, the *Obergefell* plaintiffs from Michigan originally brought suit challenging the state's adoption law for that exact reason. April DeBoer and Jayne Rowse were raising their adopted children together, but because of Michigan's adoption law, the children could only have a legal relationship with one parent.[366] Therefore, DeBoer was the legal adoptive parent of their daughter Ryanne, and Rowse was the legal adoptive parent of their two sons Nolan and Jacob.[367] Because of the adoption law, even if DeBoer wrote in her will that Rowse should have custody of Ryanne, her decision had no legal status. Therefore, a judge could have awarded the child to

[363] Ibid., at 2633 (Thomas, J., dissenting).
[364] Ibid., at 2635 (Thomas, J., dissenting).
[365] Ibid., at 2635-36 (Thomas, J., dissenting).
[366] Joseph Lichterman, "Michigan Same-sex Marriage Ban Faces Federal Test in October," Reuters, last modified July 10, 2013, accessed March 27, 2016, http://www.reuters.com/article/us-usa-gaymarriage-michigan-idUSBRE96A02020130711.
[367] Ibid.,

someone else, and the surviving parent, who raised the child since birth, would effectively be a legal stranger to the child.[368] Therefore, while Thomas is correct in his assertion that the plaintiffs were able to create wills, given that the wills held no legal status it is hard to argue that DeBoer, Rowse and other same-sex couples in their position were *not* deprived of liberty. There is no benefit to signing a legal document that offers no protection from government intrusion.

The fourth point of criticism of Kennedy's *Obergefell* opinion is what the dissenting Justices claim as his "unprincipled" due process analysis. In his dissent, Roberts notes that even though the Solicitor General, who argued in support of the petitioners, "expressly disowned the due process argument before the Court [in oral argument]. . .The majority nevertheless resolves these cases for petitioners based almost entirely on the Due Process Clause."[369] He further contends "the majority's argument is that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society," which is "indefensible as a matter of constitutional law."[370] Roberts acknowledges that substantive due process protects certain fundamental liberty interests "against state deprivation," and these fundamental liberty interests can only be abrogated if the state offers compelling justification.[371] However, Roberts argues that there are limits to this approach and the Court should be wary of holding laws unconstitutional because it finds them "unwise, improvident, or out of harmony with a particular school of thought."[372]

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[368] Jerry Markon, "Meet the Couples Who Will Be Part of History in the Same-sex Marriage Battle," *The Washington Post* (Washington, DC), January 16, 2015, accessed March 3, 2016, https://www.washingtonpost.com/politics/meet-the-couples-who-will-be-part-of-history-in-the-same-sex-marriage-battle/2015/01/16/ee4ce490-9dd5-11e4-bcfb-059ec7a93ddc_story.html.; Nina Totenberg, "Meet the 'Accidental Activists' of the Supreme Court's Same-Sex Marriage Case," NPR, last modified April 20, 2015, accessed March 3, 2016, http://www.npr.org/2015/04/20/401007033/meet-the-accidental-activists-of-the-supreme-courts-same-sex-marriage-case.
[369] Obergefell, at 2615 (Roberts., C.J., dissenting).
[370] Ibid., at 2616 (Roberts., C.J., dissenting).
[371] Ibid., (Roberts., C.J., dissenting).
[372] Ibid., 2617 (Roberts., C.J., dissenting).

Roberts claims that in its due process analysis and understanding of liberty, the Court broke with precedent and returned to the unprincipled approach of *Lochner*.[373] As mentioned earlier in this chapter, the Court in *Lochner* determined that a New York law preventing bakers from working more than ten hours a day violated the liberty of the bakers protected by the Due Process Clause because bakers had the freedom of contract to bargain for themselves. While the Court has since repudiated that decision, to say that Kennedy invoked the same reasoning in *Obergefell* is incorrect. As Tribe argues, there is a significant difference between *Lochner* and *Obergefell,* namely that no one at the time of *Lochner* argued that the ruling provided a way to redress the economic subordination of bakers. In contrast, "the freedom to marry championed in *Obergefell* was understood by all to directly redress the subordination of LGBT individuals."[374]

The fifth criticism of Kennedy's opinion is the absence of traditional equal protection analysis. Chief Justice Roberts' dissent asserts "[t]he majority does not seriously engage with [the equal protection] claim. Its discussion is, quite frankly, difficult to follow," and the main point the opinion makes is that there is a synergy between the Equal Protection Clause and Due Process Clause and other precedents relying on one clause have relied on the other.[375] Perhaps most notably, however, Roberts writes:

> Absent from this portion of the opinion, however, is anything resembling our usual framework for deciding equal protection cases. It is case book doctrine that the "modern Supreme Court's treatment of equal protection claims has used a means-ends methodology in which judges ask whether the classification the government is using is sufficiently related to the goals it is pursuing."[376]. . .The majority goes on to assert in conclusionary fashion that the Equal Protection Clause provides an alternative basis for its holding. Yet the majority fails to provide even a single sentence explaining how the Equal Protection Clause supplies independent weight for its position, nor does it attempt

[373] Ibid., at 2619 (Roberts., C.J., dissenting).
[374] Tribe, "Equal Dignity: Speaking Its Name," 18.
[375] Obergefell, at 2623 (Roberts., C.J., dissenting).
[376] Ibid., (Roberts., C.J., dissenting). Citing G. Stone, L. Seidman, C. Sunstein, M. Tushnet, and P. Karlan, Constitutional Law 453 (7th ed. 2013)

> to justify its gratuitous violation of the canon against unnecessarily resolving constitutional questions.[377]

While Yoshino in particular argues the absence of equal protection is intentional, he also argues it was ultimately better for same-sex couples because "the synergy that [Kennedy] discussed meant that equal protection analysis could inform substantive due process in such a way that would perforce change the usual framework of analysis."[378] Yoshino further discusses how Kennedy introduced this synergy in *Lawrence,* when he determined the case in terms of substantive due process because the liberty analysis advanced both due process and equal protection:[379]

> [B]y engaging in the liberty analysis in *Lawrence*, Kennedy required the states to level up to treat both straights and gays equally, which in that case meant the elimination of all sodomy statutes. Put differently, the equality concerns implicated in that case were, against intuition, better served under the Due Process Clause rather than under the Equal Protection Clause. . .In *Obergefell*, a standard equal protection ruling would have permitted the states either to level up by granting both same-sex couples and opposite sex couples marriage licenses or to level down by refusing to grant licenses to both sets of couples.[380]

Therefore, he argues Kennedy's focus on due process "protects the *true* equality interests of gays and lesbians more than an equal protection decision ever could,"[381] because:

> An individual could take the principled view that the state should not be in the business of running recreational facilities. Yet even that individual should have qualms if the reason a municipality closes a public pool is to avoid integrating it on racial lines.[382] Similarly, an individual could hold the principled view that the state should be out of the marriage business. Yet even that individual should have qualms if the reason for shutting down civil marriage is the threat of the same-sex couples entering the institution.[383]

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[377] Ibid., 2623 (Roberts., C.J., dissenting).
[378] Yoshino, "New Birth of Freedom?," 172-73.
[379] Ibid., 173
[380] Ibid.,
[381] Ibid., 174
[382] Palmer v. Thompson 403 U.S. 217, 218-19 (1971). (In that case Jackson, Mississippi closed four city owned swimming pools instead of integrating. The Court held that the closing of pools to all persons did not constitute a denial of equal protection under the Fourteenth Amendment to African Americans).
[383] Yoshino, "New Birth of Freedom?," 174.

While it is correct that individuals *should* have qualms if civil marriage is shut down due to the threat of same-sex couples entering into the institution, that has not prevented some individuals from refusing to provide marriage licenses, or state representatives from suggesting the end to marriage all together.[384] Therefore while in principle Yoshino's argument is valid, in reality, due process has proven to provide little protection to some same-sex couples seeking marriage.

In addition to his argument about the absence of a traditional equal protection analysis, Roberts does claim that even if Kennedy *did* include it, the laws in question did not violate the clause, under rational basis, because they are rationally related to a "legitimate interest" in "preserving the traditional institution of marriage."[385] Interestingly, he does allow that "the equal protection analysis might be different, in my view, if we were confronted with a more focused challenge to the denial of certain tangible benefits," signaling that if a case is brought in the future on equal protection grounds in which homosexuals are denied concrete benefits, then those claims may raise constitutional questions.[386]

All of the dissenting Justices also discuss the decision's broader implications. First, Roberts, Alito, and Thomas raise concerns about the religious liberty of individuals who believe that marriage is a union between a man and a women and homosexuality is a sin. In his dissent, Chief Justice Roberts presents hypothetical examples such as a religious college that provides married students housing but only to opposite sex couples, or a religious adoption agency that declines placing children with same-sex couples.[387] Justice Alito also argues that the decision

[384] Sheryl Gay Stolberg, "Kentucky Clerk Defies Court on Marriage Licenses for Gay Couples," *The New York Times*, August 13, 2013, accessed October 26, 2015, http://www.nytimes.com/2015/08/14/us/kentucky-rowan-county-same-sex-marriage-licenses-kim-davis.html.
[385] Ibid., 2623 (Roberts., C.J., dissenting).
[386] Ibid., 2623 (Roberts., C.J., dissenting) (It may be significant that Roberts used benefits instead of rights).
[387] Ibid., 2625-26 (Roberts., C.J., dissenting)

will have a negative impact on religious liberty and goes as far to say it will be used to "vilify" persons "unwilling to assent to the new orthodoxy."[388] Additionally, he argues that analogizing same-sex marriage bans to laws that denied equal treatment for African American and women is dangerous and "will be exploited by those who are determined to stamp out every vestige of dissent."[389] Perhaps most scathing, however is his assertion that "those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools."[390]

In addition to the arguments about the implications of the opinion on religious liberty, Chief Justice Roberts also argues that the opinion in *Obergefell* may open the door for polygamy because it makes it more difficult for the states to maintain their definition of marriage as a union between two people.[391] Roberts argues that if there is dignity in a same-sex couple using their autonomy to make the profound choice to marry, then it is hard to argue there is less dignity in the bond between three people who autonomously make the profound choice to marry.[392] Roberts argues that since both same-sex marriage and plural marriage seek to alter the "core" definition of marriage, there is no principled way to validate one but not the other. While there are some proponents of polygamy, Den Otter for example, that argue *Obergefell* laid the groundwork for plural marriage, same-sex marriage will not, and cannot lead directly to polygamous marriages. Even if polygamists bring suit to legalize plural marriage after

[388] Ibid., 2642-2643 (Alito., J., dissenting)
[389] Ibid.,
[390] Ibid.,
[391] Obergefell, 2621 (Roberts., C.J., dissenting) ("Although the majority randomly inserts the adjective 'two' in various places, it offers no reason at all why the two person element of the core definition of marriage may be preserved while the man-woman element may not.")
[392] Ibid., 2622 (Roberts., C.J., dissenting).

Obergefell, the likelihood of the bans being lifted is very slim because the state's interest in limiting the number of marriage partners is strong.[393]

The dissenting Justices and their supporters argue that the *Obergefell* opinion was an example of judicial activism, created a new right, misinterpreted the meaning of liberty, reverted to *Lochner's* unprincipled due process analysis, and ignored the equal protection clause. As shown in this chapter, the Justices framed the issue in *Obergefell* differently to arrive at a desired result. Both Alito and Roberts deny the fundamental right to marry exists in a comprehensive sense and justify that position by relying upon traditional definitions of marriage. As demonstrated, rights evolve, and excluding a group for their innate sexuality, or because marriage has always excluded them, are not compelling reasons to continue excluding them. Additionally, despite Justice Thomas' effort to explain that the government has not abridged the liberty of same-sex couples, the plaintiffs from Michigan had no way to ensure their children would not be considered legal strangers to their family.

While Roberts, Alito, Scalia, and Thomas all disagree in the reasoning and the outcome of the *Obergefell* decision, Tribe and Yoshino both answer the questions of the dissents and show how, particularly in terms of due process, the *Obergefell* opinion was principled and rooted in precedent.[394] Tribe and Yoshino argue it is both acceptable, preferable, and predictable that Kennedy fused his due process and equal protection analyses instead of making distinct arguments for equal protection and due process.

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[393] There is not a concrete class of persons who could make a claim under the Equal Protection Clause the way that homosexuals did in *Obergefell.* Arguably polygamists could make a religious freedom claim, however, the state has compelling reasons to limit the marriage between two persons such as the potential harm to children with parents in polygamist relationships, the subordination of women, and the administrative nightmare of plural marriage (ie filing taxes, medical benefits, inheritance, power of attorney, etc). See Joseph J. Fischel, review of *In Defense of Plural Marriage*, by Ron C. Den Otter, *The Journal of Politics* 78, no. 1 (January 2016): E6, accessed November 16, 2015, DOI:10.1086/684311. Citing United States v. Carolene Products Company, 304 U.S. 144, (1938), (152n4).

[394] While I agree that some of the claims Tribe and Yoshino make provide good counterarguments to the dissenting Justices, they do not take into account all of the implications of the opinion in terms of equal protection and determining the level of scrutiny.

CHAPTER V

> Even those who emphatically agree with Justice Kennedy that the Constitution affords same-sex couples the right to marry, many are quick to claim that his sweeping opinion was heavy on rhetoric and light on legal reasoning -- a political masterstroke but a doctrinal dud.[1]

Concurrences off the Court: With Outcome, Not Reasoning

Though there were no concurring opinions written by any of the Justices on the Court, there have been a number of legal scholars and journalists who, while agreeing with the ultimate outcome of the *Obergefell* decision, disagree with the reasoning Kennedy used to achieve that end. While the arguments of these groups focus on a variety of implications of the opinion such as tax reform,[2] estate planning,[3] and adoptions,[4] the more important criticisms of the opinion pertain to Kennedy's failure to determine the standard of review for sexual orientation. The main arguments of these critics are that the opinion avoided determining the standard by focusing too narrowly on the fundamental right to marry and by fusing the Due Process Clause and Equal Protection Clause instead of providing a clear independent analysis of each. As Peter Nicolas writes:

> That lack of transparency both leaves the Court's decision vulnerable to criticism and as *ipse dixit*[5]. . .and denies litigants and lower courts the guidance they need to apply the constitutional principle consistently in future cases.[6] For this reason, *Obergefell* and its

[1] Tribe, "Equal Dignity: Speaking Its Name," 16.
[2] Infanti, Anthony C. "Victims of Our Own Success: The Perils of Obergefell and Windsor." *Ohio State Law Journal* 76 (2015): 79-85. Accessed November 29, 2015. http://ssrn.com/abstract=2664248.
[3] Karibjanian, George D. "Obergefell: The Final Word (But Not Really) on Same-Sex Marriage." *Trusts & Estates* 154, no. 8 (August 2015): 34-37. Accessed October 22, 2015. Index to Legal Periodicals Full Text (108765469).
[4] Zarembka, Arlene. "Advising Same-Sex Couples after Obergefell and Windsor." *GPSolo* 32, no. 4 (June/July 2015): 34-37. Accessed October 22, 2015. Index to Legal Periodicals Full Text (108835520).
[5] Ipse dixit: a dogmatic and unproven statement
[6] See Cleburne v. Cleburne living 473 U.S. 432, 459-60 (1985) (Marshall, J., concurring in part and dissenting in part) ("[B]y failing to articulate the factors that justify today's 'second order' rational-basis review, the Court provides no principled foundation determining when more searching inquiry is to be invoked.") Cited in Nicolas, "Obergefell's Squandered Potential," 144.

> antecedents represent a somewhat unstable base upon which to build future gay rights victories.[7]

Of course, Kennedy may have deliberately tied the Equal Protection Clause and Due Process Clause tightly together, and avoided determining the standard of review for classifications on sexual orientation. To properly evaluate and analyze the claims of those who criticize him for doing so, it is necessary first to reconsider the arguments that help explain *why* Justice Kennedy avoided determining the standard in *Romer, Lawrence,* and *Windsor,* and then why he did so again in *Obergefell.*

As discussed in chapter II, in *Romer* the Court potentially did not have to determine the level of scrutiny because Amendment 2 violated the Equal Protection Clause on its face and could not even pass the rational basis test. Additionally, the state trial court had rejected the contention that sexual orientation was a semi-suspect or suspect classification and the petitioners in *Romer* did not appeal that part of the ruling to the Supreme Court so it would have been awkward for the Court to answer it.[8] In *Lawrence* Kennedy stated in his opinion that he wanted to overrule *Bowers* and thought that rooting his decision in the Equal Protection Clause made it impossible to do so. Kennedy worried that using equal protection would mean sodomy bans could be upheld if they were drawn to prohibit sodomy generally and did not single out homosexual sodomy.[9] That said, some scholars contend that Kennedy could have used the reasoning in *Loving* to apply the Due Process Clause to overrule *Bowers* and then apply the Equal Protection Clause to declare that sexual orientation was a suspect or semi-suspect classification.[10] Additionally, given the Court's rejection of the equal *application* argument in

[7] Nicolas, "Obergefell's Squandered Potential," 144.
[8] Ibid., 138
[9] Ibid., 139
[10] Ibid., 139. ("Yet even if he felt compelled to address the due process claims and overrule *Bowers,* Justice Kennedy could have also addressed the class-based equal protection claim by following the example of Loving v.

Loving, Kennedy could have used equal protection to determine the standard of review and argued that a general sodomy ban was still invalid under the Fourteenth Amendment, even if the bans treated same-sex couples and opposite sex couples equally.

In *Windsor,* Kennedy avoided addressing equal protection at all and stressed the right to dignity implicit in the Due Process Clause. As in *Romer,* the Court possibly declined to determine the standard of review in *Windsor* because on its face, DOMA was unconstitutional and could not pass the rational basis test. Additionally, in *Windsor* if the Court had used heightened or strict scrutiny, it would have effectively ended the entire marriage debate nationwide and overturned same-sex marriage bans in 38 states. Another possible reason is that *Windsor* also dealt with a federal law which had incredibly broad implications nationwide.

One potential reason why Kennedy may have focused so much on the fundamental right to marry instead of classifying sexual orientation as a semi-suspect or suspect classification in *Obergefell* is because Kennedy is deeply concerned about fundamental rights.[11] Since Kennedy's time on the Ninth Circuit, his opinions have made clear that he values individual rights over group based classifications. Another possible reason why Kennedy chose to focus on the fundamental right to marry and not the classification of homosexuals is because the questions asked in *Obergefell* dealt specifically with marriage. While it is true that the Supreme Court in *Obergefell* was answering questions regarding whether the states could deny same-sex couples *marriage,* that does not mean the Court was barred from using a class based approach to strike down the marriage bans. On the contrary, in each of the cases that determined race and gender

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Virginia. There the Court struck down miscegenation laws alternatively on the ground that they violated the fundamental right to marry *and* the ground that they constituted class-based discrimination in violation of the Equal Protection Clause.")

[11] Ibid., 144 ("Kennedy might have a different view of the proper role of equal protection clause, preferring an approach that is rights focused, rather than class focused and moving away from the rigid tiered approach in favor of a more unitary approach.")

were suspect and semi-suspect classifications respectively, the Court determined the level of scrutiny despite that not being part of the constitutional question they sought to answer directly. Therefore, the Court could have focused on the fundamental right to marry *and* the class based restriction of the marriage laws.

Another potential reason why Kennedy avoided focusing on the standard of review, is because it would have been too broad of an approach. However, because the Court focused narrowly on the fundamental right to marry, the Court now has to defend all of the government restrictions on marriage. Although, as discussed in the last chapter, the Court will likely be able to uphold the restrictions on plural marriage, that door may have not been opened at all if Kennedy took a class based equal protection approach in *Obergefell*. A class based equal protection decision would *only* apply to laws prohibiting marriage based on sexual orientation and would hold that denying marriage to a group of people for their sexual orientation cannot stand under the equal protection clause. Such a decision would not bring laws restricting marriage on the basis of age, genealogy, and number into question.[12]

Lastly, Kennedy may have chosen not to provide independent equal protection analysis in his opinion because he wanted to treat the constitutional guarantee of the Due Process Clause and the Equal Protection Clause as unified and thereby solidify the reasoning that he first used in *Lawrence* emphasizing that the clauses reinforce each other. In other words, unlike in *Loving* where the Court treated liberty and equality claims as parallel rather than intertwined, *Obergefell* explicitly treated the two clauses as a double helix, such that: "each concept -- liberty and equal protection -- leads to a stronger understanding of the other."[13] While Tribe and Yoshino argue

[12] Ibid., 143
[13] Yoshino, "New Birth of Freedom?," 172.

there are benefits to deciding the case on due process grounds, and lumping equal protection with it, there are also potential problems.

For example, in *DeShaney v. Winnebago County Social Services*[14] the Court said that the government did not have to protect the life, liberty, and property of its citizens against the invasion of *private* actors. The Court argued that the Due Process Clause limits the state's power to act, but it does not guarantee minimal levels of safety and security.[15] While the facts of *DeShaney* and *Obergefell* are very different, the due process principles are similar. The *Obergefell* decision only protects homosexuals from government intrusion on their marriages, not in any other respect. While same-sex couples can get married, there is no protection from being fired from their jobs, or being discriminated against in housing, public accommodations, and credit. Additionally, some private actors are still able to discriminate against people on the basis of sexual orientation and, in many cases, *legally* deny gays and lesbians their "equal dignity" in contexts outside marriage because there are no anti-discrimination laws to prevent private actors from doing so.

Obergefell also arguably left gays and lesbians in a disadvantageous position in terms of their ability to fight against discrimination that occurs in the name of religious liberty. Under *Obergefell*, homosexuals who are discriminated against in the name of religion are only supported by their right to "equal dignity," or under state or local anti-discrimination laws. However, since the federal government has no broad protections against discrimination on the basis of sexual orientation, and less than half of the states have such laws, only some

[14] 498 U.S. 189 (1989). In that case, a toddler became comatose from severe head injuries received from an abusive father over a long period of time. While Social Services took steps to protect the child after numerous complaints, they did nothing to remove the child from the father's custody. The child's mother sued Social Services arguing the Department had deprived the child of liberty to bodily integrity under due process and did not do enough to protect the child from the father's abuse.
[15] Yoshino, "New Birth of Freedom?," 161.

homosexuals, based on state and local laws, can file a lawsuit in court after facing discrimination. Even then, because they are not a protected class, there is no guarantee that the court will rule in their favor and that anti-discrimination laws serve a compelling government interest.

Additionally, in the 28 states that do not have anti-discrimination laws, if homosexuals are discriminated against in other contexts outside of marriage such as housing, credit, and public accommodations, they will be out of luck. If they are discriminated against within the context of marriage or denied the right to marry, as has happened since *Obergefell,* courts may have to measure their claim to "equal dignity" against the First Amendment right to religious liberty. If Kennedy determined the standard of review, a law that exempts government officials or other persons from providing marriage licenses or other marriage related services, would have to prove that the exemption serves a compelling interest. Furthermore, the government would have to prove it serves a compelling interest that *overrides* the compelling interest of ridding society of discrimination.

While the freedom of religion is a compelling interest, it is unclear whether it outweighs the compelling interest of rooting out discrimination. Regardless, it is more difficult to prove it outweighs the compelling interest of rooting out discrimination than it is to prove it outweighs guaranteeing same-sex couples' equal dignity. Therefore, declaring sexual orientation a semi-suspect class would have protected homosexuals not only from government intrusion, but also at least give them equal footing to counter private actors claiming they have a religious right be exempt from serving same-sex couples or facilitating the "gay lifestyle."

While Kennedy was able to justify not determining the standard of review in *Romer, Lawrence,* and *Windsor,* the potential reasons for eschewing the issue in *Obergefell* are harder to

defend. Even if Kennedy felt he needed to use the fundamental rights claim to overrule the Court's one line summary dismissal of *Baker v. Nelson,* he could have followed the *Loving* example and declared the statutes unconstitutional on substantive due process fundamental rights grounds, *and* class-based equal protection grounds.[16] Again, as in *Romer* and *Windsor,* it is possible that Kennedy felt the laws were unconstitutional on their face and it did not matter what standard of review was used. However, in terms of race and gender, the Court's precedent shows that the Court can determine the standard of review even if the laws would not even pass rational basis.

The process of determining race as a suspect classification subject to strict judicial scrutiny took the Court about thirteen years.[17] In *Brown v. Board of Education,* the Court used the Equal Protection Clause to reason that laws discriminating based on race were unconstitutional.[18] Though the Court did not apply strict scrutiny to the laws in question, which denied blacks equal access to educational opportunities, it nonetheless determined that laws based on race could not stand under the Fourteenth Amendment. It is possible that the Court did not determine those laws were subject to strict scrutiny because it sought to avoid deciding the constitutionality of anti-miscegenation laws before the Court was ready to take on that controversy.[19] Ten years later in *McLaughlin v. Florida* the Court re-characterized its understanding of the Equal Protection Clause to apply strict scrutiny to laws that made

[16] Peter Nicolas, "Obergefell's Squandered Potential," 139-140.
[17] Ibid., 140 footnote 25 (Though there were some cases, namely Strauder v. West Virginia, 100 U.S. 303 (1880) -- where the Court struck down statutes that discriminated against African Americans based on race, and stated that the laws denied the African Americans equal protection -- for the purposes of this paper, I am not including cases that were decided before Plessy v. Ferguson, 163 U.S. 537 (1896) which started a new age of equal protection judicial review, in which African Americans were essentially unprotected by the Equal Protection Clause)
[18] Brown v. Board of Education, 349 U.S. 294 (1954). Interestingly, in the *Obergefell* opinion, Justice Kennedy does not mention *Brown* and talks about *Loving* solely in the context of the fundamental right to marry, not class-based equal protection side of the decision.
[19] Nicolas, "Obergefell's Squandered Potential," 140. Footnote 23 citing Evan Gerstmann, *The Constitutional Underclass: Gays, Lesbians, and the Failure of Class-Based Equal Protection* 36 (Univ. of Chicago Press 1999).

classifications based on race.[20] In that case, the Court overturned a Florida criminal statute which prohibited unmarried interracial couples from habitually living in, and occupying the same room at night.[21] In the ruling, the Court argued one "cannot conceive of a valid legislative purpose. . .which makes the color of a person's skin the test of whether his conduct is a criminal offense."[22] Three year later, strict scrutiny was used in *Loving v. Virginia* to invalidate bans on interracial marriage, and, as discussed previously, the Court held that the state had no compelling interest other than invidious racial discrimination to justify the laws.[23]

The trajectory for gender to be subject to heightened or intermediate scrutiny followed a similar pattern to that of race. In *Reed v. Reed,* the Court used the Equal Protection Clause to strike down laws that discriminated against women (by making sex-based classifications) for the first time.[24] In that ruling the Court struck an Idaho law that specified "males must be preferred to females" in appointing administrators of estates[25] as unconstitutional, reasoning:

> To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause for the Fourteenth Amendment. . .[T]he choice in this context may not be lawfully mandated solely on the basis of sex.[26]

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[20] McLaughlin v. Florida, 379 U.S. 184 (1964).
[21] Ibid.,
[22] Ibid., at 379 U.S. 184 (Stewart, J., joined by Douglas, J., concurring)
[23] Peter Nicolas, "Obergefell's Squandered Potential,"141
[24] Reed v. Reed, 404 U.S. 71, 75 (1971). (Section 15-314 is restricted in its operation to those situations where competing applications for letters of administration have been filed by both male and female members of the same entitlement class established by § 15-312. In such situations, § 15-314 provides that [males be preferred to females] and it thus establishes a classification subject to scrutiny under the Equal Protection Clause.)
[25] Ibid., at 72-72 (Idaho code 15-312 and 15-314: "Section 15-312 designates the persons who are entitled to administer the estate of one who dies intestate. In making these designations, the section lists 11 classes of persons who are so entitled, and provides, in substance, that the order in which those classes are listed in the section shall be determinative of the relative rights of competing applicants for letters of administration. One of the 11 classes so enumerated is "[t]he father or mother" of the person dying intestate. Under this section, then, appellant and appellee, being members of the same entitlement class, would seem to have been equally entitled to administer their son's estate. Section 1314 provides, however, that "[o]f several persons claiming and equally entitled [under § 1312] to administer, males must be preferred to females, and relatives of the whole to those of the half blood.")
[26] Ibid., at 76-77

Two years later in *Frontiero v. Richardson,* the Court then re-characterized the *Reed* ruling in a plurality opinion to apply strict scrutiny to the classifications.[27] In that decision, the Court struck down a federal law that allowed wives of members of the military to automatically become dependents of their husbands, but did not allow husbands of female members of the military to become dependents, unless they were dependent on their wives for more than half of their support.[28] By 1976 in *Craig v. Boren,* the Court agreed that intermediate scrutiny would be used for sex-based classifications.[29] In that ruling, the Court invalidated an Oklahoma law that prohibited the sale of non-alcoholic 3.2 percent beer to males under twenty-one and to females under eighteen.[30] Therefore, from beginning to end, it took the Court just five years to determine that gender was a semi-suspect class and laws that classified based on gender required heightened or intermediate scrutiny.

As of today, there is currently no judicial consensus on whether sexual orientation is a suspect, a quasi-suspect, or a non-suspect classification.[31] Although some scholars agree that the Court has used a more "rigorous" form of rational basis review for laws that classify based on sexual orientation, the Supreme Court has not been explicit in its terminology. It is important to note that the Court is prudent when it avoids hastily classifying a group as suspect or semi-suspect, as declaring the classification decides most or all future laws impacting a given group,

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[27] Frontiero v. Richardson, 411 U.S. 677, 688 (1973). ("With these considerations in mind, we can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny. Applying the analysis mandated by that stricter standard of review, it is clear that the statutory scheme now before us is constitutionally invalid.")
[28] Ibid.,
[29] Craig v. Boren, 429 U.S. 190, 218 (1976). (Gender classifications require substantial relation to important government objectives to pass intermediate scrutiny)
[30] Ibid.,
[31] Karibjanian, "Obergefell: The Final Word," 34.; Brett Parker, "What Level of Legal Scrutiny Should Sexual Orientation-Based Classifications Receive?," The Stanford Political Journal, last modified January 19, 2015, accessed October 30, 2015, http://stanfordpolitics.com/2015/01/what-level-of-legal-scrutiny-should-sexual-orientation-based-classifications-receive/.

and thus decides a large number of future controversies.[32] The Court understandably wants to tread carefully before making such a declaration.[33] However the Court has had more than enough time to tread and take a cautious approach to determine the standard of review for sexual orientation.

As Kennedy noted twice in his *Obergefell* opinion, there is substantial evidence supporting the notion that sexual orientation is an immutable characteristic.[34] Additionally, in its amicus brief filed in the case, the United States government presented strong evidence of how over the course of the last century gays and lesbians were "jailed for having sex, barred from immigrating to the United States, blacklisted from public employment, stripped of child custody, and subject to sterilization and castration at judicial whim."[35] Therefore, given homosexuals have been subject to a history of discrimination; they exhibit an obvious, immutable, or distinguishing characteristic; and they are a minority with less political power than non-suspect classes, it would appear that gays and lesbians meet the criteria to be considered a suspect or semi-suspect class. However, while the Court took approximately thirteen years to determine race was a suspect classification, and five years to determine gender was a semi-suspect classification, the Court has used the Fourteenth Amendment to strike down laws that target homosexuals without determining a clear standard of review since 1996, a twenty year period.

Historically there have been several negative consequences of *not* determining the standard of review. For one, lower courts have no guidance and have to interpret the classifications on a case by case basis. The Court's failure to declare sexual orientation a suspect or semi-suspect classification in *Romer* and *Lawrence* resulted in concrete harm to gays and

[32] Nicolas, "Obergefell's Squandered Potential," 140.
[33] Ibid., 140
[34] Brief for American Psychological Association et al. at 7-17, Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
[35] Garrett Epps, "Gay Marriage Gets Its Day in Court," The Atlantic, last modified April 27, 2015, accessed February 21, 2016, http://www.theatlantic.com/politics/archive/2015/04/gay-marriage-gets-its-day-in-court/391487/.

lesbians because lower courts have repeatedly upheld laws discriminating on the basis of sexual orientation, such as the Don't Ask Don't Tell policy,[36] and laws prohibiting gays and lesbians from adopting,[37] reasoning that only rational basis review applied and that the laws at issue satisfied that deferential level of review.[38]

Currently, the Second, Seventh, and Ninth circuits consider sexual orientation a semi-suspect classification but the eight other circuits do not. This creates problems and inconsistency of treatment for homosexuals depending on where they live or file a lawsuit. Additionally, as will be discussed in the next chapter, without a clear standard of review, state legislatures may pass laws that classify based on sexual orientation or target homosexuals in other ways. Even though some of these laws are being challenged in court, there is no guarantee they will need to pass anything more than the rational basis test. Additionally, the failure to declare sexual orientation a semi-suspect or suspect classification creates future harm because of the continued legal uncertainty it creates for gays and lesbians. For example, since *Obergefell* was laser focused on marriage without determining the standard of review, the case can be distinguished from other cases where homosexuals are discriminated against in contexts other than marriage.[39] As Garrett Epps notes, perhaps the most obvious implication of not determining the standard of review is that:

> [E]very state discrimination -- whether in adoption, foster care placement, child custody, health care, employee benefits, and so on, will have to be litigated to determine whether there's a [*reason*] strong enough to allow it. It will be tedious; it will be demeaning; and (perhaps worse from the justices' point of view) it will require the Supreme Court to resolve the issue over and over again.[40]

[36] See Cook v. Gates, 528 F.3d 42, 60-62 (1st Cir. 1998)
[37] See Lofton v. Secretary of Dep't of Children and Family Services, 358 F.3d 804, 815-18 (11th Cir. 2004)
[38] Nicolas, "Obergefell's Squandered Potential," 142.
[39] Ibid., 142.
[40] Epps, "Gay Marriage Gets Its Day in Court," The Atlantic.

Not surprisingly, the most vocal opponents of determining the standard of review for sexual orientation are also staunch opponents of same-sex marriage and gay rights generally. Though it is more difficult now given the scientific evidence that sexual orientation is innate, they tend to argue that homosexuality is a choice, unlike race and therefore does not deserve to be treated as an immutable characteristic.[41] Additionally, opponents deny that gays are lacking political power due to the number of gay rights laws enacted by states and Congress over the last couple of decades. However, as Epps notes:

> [A] few years of mixed results cannot wipe out a century of hostility and exclusion. And it hardly helps the case that some of those forecasting untroubled success for the gay rights movement are the same people digging in their heels to retard and even reverse it.[42]

Additionally, there are several benefits that determining the standard of review would give to gays and lesbians in America. For one, a clear determination of the standard of review from the Supreme Court would bind lower courts to use that standard and would also serve as precedent for any other case that is brought to the Court where a classification is drawn based on sexual orientation. Second, determining the standard of review would deter governmental actors from passing laws that classify based on sexual orientation knowing that the laws would be subjected to a level of scrutiny that the laws would not likely survive. Perhaps most importantly, a heightened level of scrutiny would "give gays and lesbians a measure of repose, affording them the same certainty that racial minorities and women have that laws targeting them are unlikely to be upheld by courts today."[43]

That is not to say that declaring the standard of review would solve all of the problems homosexuals face in America and discrimination on the basis of sexual orientation would vanish.

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[41] Klarman, *From the Closet to the Altar*, 54-55.
[42] Epps, "Gay Marriage Gets Its Day in Court," The Atlantic.
[43] Nicolas, "Obergefell's Squandered Potential," 138.

If determining the standard of review was an antidote for discrimination, then racism and sexism, would no longer exist. Additionally, drawing parallels between sexual orientation and race and between *Loving* and *Obergefell* does not equate them. There are stark and significant differences between the Gay Rights Movement and the Civil Rights Movement, just as there are between sexual orientation and race. However, there are parallels between the two, and the comparison demonstrates that there are many benefits for a class of persons if they are considered a protected class under the Fourteenth Amendment.

While there was much to celebrate on the day of the *Obergefell* decision, for some the opinion produced a pang of uncertainty and disappointment. Despite homosexuals meeting all the requirements to be a suspect or semi-suspect class, and having four instrumental class based victories in the Court over the last two decades, the Court in *Obergefell* chose not to determine the standard of review. While it is true that Kennedy's gay rights jurisprudence created the framework for his *Obergefell* opinion, and there are some undeniably positive outcomes of the reasoning used in *Obergefell,* the opinion also cemented the reality that the fight for gay rights is long from over.

Conclusion

Where Do We Go From Here?

> Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices. . .can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and, in effect, to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances. *Reynolds v. United States,* 98 U.S. 145, 166-167 (1878).

Anti-Discrimination Laws and Religious Liberty Before and After *Obergefell*

Before *Obergefell* there were several cases around the country that were brought against business owners and government officials who had religious objections to serving gay people in general, same-sex couples specifically, or providing their services for same-sex weddings.[1] Of the cases brought, several were in states that had anti-discrimination laws covering sexual orientation in public accommodations.[2] In some of the states, same-sex marriage was already legal and some states had Religious Freedom Restoration Acts (RFRA)[3] or RFRA-like language

[1] Robert Ingersoll v. Arlene's Flowers, Inc., (Super. Ct. Dec. 19, 2014), cert granted, Super Ct. (U.S. March 2, 2016) (No. 91615-2) (florist); Cervelli v. Aloha Bed & Breakfast, Civ. No. 11-1-3103-12 ECN, Order (Haw. Circ. Court 1st Cir. Apr. 15, 2013) (bed and breakfast); Craig v. Masterpiece Cakeshop, Inc., 2015 WL 4760453 at *7 (bakery); Bernstein v. Ocean Grove Camp Meeting Ass'n, No. CRT 6145-09 (N.J. Div. On Civil Rights Oct. 22, 2015) at 11 (wedding venue); Odgaard v. Iowa Civil Rights Comm'n, No. CVCV046451 (Iowa Dist. Ct. Oct. 7, 2013); Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013); Matter of Gifford v. McCarthy No. 520410 (N.Y. App Div. Jan. 14, 2016) (photographer); Bureau of Labor and Industries of the State of Oregon in the Matter of: Melissa Elaine Klein, dba Sweet Cakes by Melissa No. 44-14 & 45-14 (2015) (bakery)

[2] Colorado, Iowa, New Mexico, New York, Oregon, Washington.

[3] In reaction to the Court's decision in Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 889 (1990) Congress unanimously passed the Religious Freedom Restoration Act (RFRA) in 1993 which stated: [The] Government shall not substantially burden a person's *exercise of religion* even if the burden results from a rule of general applicability, except. . .if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest. 42 U.S. Code § 2000bb–1. In *Smith,* the Court abandoned the strict scrutiny standard traditionally used for First Amendment cases where plaintiffs sought exemptions. And determined that neutral, generally applicable laws were constitutional even if the laws burdened religious exercise.

in their constitutions.[4] The circumstances in these cases vary widely, however, this section will focus on three cases that represent the kinds of claims made by religious objectors.

First, business owners in states that had anti-discrimination laws *and* RFRA contended that RFRA demanded they be exempt from following anti-discrimination laws.[5] In *Elane Photography, LLC v. Willock*,[6] the New Mexico Supreme Court found that Elane Photography violated the state's anti-discrimination law when the owner refused to photograph a same-sex couple's commitment ceremony.[7] The court determined that the New Mexico Human Rights Act (NMHRA) did not violate New Mexico's RFRA because RFRA was not applicable in a suit between private parties. The court also held that there was no exemption from anti-discrimination laws for creative or expressive professions and the NMHRA sought to promote equal rights and access to public accommodations by prohibiting discrimination based on certain specified protected classifications.[8] Furthermore, the court rejected Elane Photography's claim that the NMHRA violated her freedom of speech and free exercise under the United States and New Mexico Constitutions.

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[4] While the original RFRA applied to both the federal government and the states, in 1997 the Supreme Court found that as applied to the states, RFRA exceeded the power of Congress. City of Boerne v. Flores, 521 US 507, 508-509 (1997)) ("All told, RFRA is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens, and is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion"). Since that ruling, twenty-two states have passed their own RFRA laws, and an additional 12 states have also proposed RFRA style bills in their state legislatures. While some of these "mini-RFRAs" are modeled after the federal law, several are broader than the federal version and go beyond the original intent of RFRA. For example, in Florida, Illinois, Kansas, Kentucky, Louisiana, Missouri, New Mexico, and Texas, the state RFRAs define "free exercise" as an act or refusal to act that is substantially *motivated* by religious beliefs. See Fla. Stat. 761.01 et seq, Ill. Rev.Stat Ch. 775 35/1 et seq, Kan. Stat 60-5301 et seq, Ky. Rev. Stat 446.350, La. Rev. Stat. 13:5231 et seq, Mo. Rev. Stat. 1.302, NM Stat. 28-22-1 et seq, Tex. Civ. Prac. and remedies code 110.001 et seq.

[5] 2006 New Mexico Statutes - Section 28-1-7(F). http://law.justia.com/codes/new-mexico/2006/nmrc/jd_28-1-7-bcb3.html

[6] Elane Photography, LLC v. Willock, 309 P3d at 73 (N.M. 2013).

[7] The case was first filed in 2006. Same-sex marriage was not legalized in New Mexico until December 2013. See table 1 in appendix more information on same-sex marriage in New Mexico.

[8] Citing Hishon v. King & Spalding, 467 U.S. 69, 78 (1984) The Court held that "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections."

Second, business owners in states that did not have a RFRA law but had anti-discrimination laws also asserted the burden the law put on their conscience was so harmful, they needed to be exempt from the laws. For example, in *Craig v. Masterpiece Cakeshop, Inc.,*[9] the Court of Appeals determined that Masterpiece Cakeshop violated the Colorado Anti-Discrimination Act (CADA)[10] for refusing to bake a wedding cake for a same-sex couple. The court also determined that CADA did not violate Masterpiece's freedom of speech and free exercise of religion protected by the United States and Colorado Constitutions.

Third, government officials in states that have RFRA and no anti-discrimination laws protecting sexual orientation, asserted RFRA required they be exempt from performing their official duties of issuing marriage licenses to same-sex couples because the action conflicted with their religious beliefs. In *Miller v. Davis,*[11] a Kentucky district court determined the Free Exercise Clause did not excuse Kim Davis, an elected government official, from issuing marriage licenses because of her religious objection to same-sex marriage.[12] Davis claimed that the state had a compelling interest to protect her religious freedom, and forcing her to sign the marriage licenses violated Kentucky's RFRA. The court determined that Davis would not suffer irreparable harm by having her signature on a marriage license issued to a same-sex couple and her religious beliefs did not excuse her from performing the duties that she took an oath to perform.[13]

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[9] Craig v. Masterpiece Cakeshop, Inc., 2015 WL 4760453 at *7
[10] Section 24-34-601(2)(a), C.R.S. 2014
[11] Miller et al., v. Davis et al., 192 L. Ed. 2d 994 (Ky Dist. Ct. 2015).
[12] Memorandum Opinion and Order, Miller v. Davis, No. 15-44-DLB (Aug. 12, 2015) http://www.clearinghouse.net/chDocs/public/PB-KY-0006-0006.pdf info
[13] Judge Bunning was an appointee of George W. Bush and his father is former Republican Senator Jim Bunning. See Alan Blinder and Richard Pérez-Peña, "Kentucky Clerk Denies Same-Sex Marriage Licenses, Defying Court," *The New York Times*, September 1, 2015, accessed April 16, 2016, http://www.nytimes.com/2015/09/02/us/same-sex-marriage-kentucky-kim-davis.html?_r=0. http://www.clearinghouse.net/chDocs/public/PB-KY-0006-0006.pdf

In cases like *Elane Photography, LLC v. Willock* and *Craig v. Masterpiece Cakeshop, Inc,* the two conflicting rights were the right to not be discriminated against in places of public accommodation and the constitutional right to free speech and free exercise of religion. In *Miller v. Davis,* the rights in question were the fundamental right to marry and the right to free exercise of religion guaranteed by the First Amendment. Each of the cases came down in favor of the LGBT plaintiffs, and although two of them were appealed to the Supreme Court, the Court did not take the cases.[14] Additionally, some of the cases dealing with similar conflicts are awaiting resolution in the appeals process in various state courts.[15] As a result of these small business owners and government officials losing in court, there has been legislation passed at the state level to grant them the exemptions they seek and to protect them from being sued for breaking anti-discrimination laws.[16] Because religious groups were failing in their arguments in state courts, they developed an argument based on a countervailing right because it allows them to turn the discrimination question on its head. Religious groups now contend that by forcing business owners and people like Kim Davis to follow the law, religious observers are being discriminated against.[17]

This claim asserts that private business owners and government employees should be accommodated for their beliefs regardless if that accommodation results in the defiance of anti-

[14] Elane Photography, LLC v. Willock, 309 P3d at 73; Miller et al., v. Davis et al., 192 L. Ed. 2d 994 (Ky Dist. Ct. 2015);

[15] Robert Ingersoll v. Arlene's Flowers, Inc., (Super. Ct. Dec. 19, 2014), *cert granted*, Super Ct. (U.S. March 2, 2016) (No. 91615-2). The Washington Supreme Court granted certiorari and oral arguments are expected in a matter of months.

[16] Some states have introduced RFRAs, others have introduced marriage related religious exemption laws, some have introduced First Amendment Defense Acts as well as acts to exempt government employees, commercial wedding services, and other things from generally applicable laws. Bills regarding religious exemptions in the realms of adoption and foster care, college and university student groups, access to health services, and more have also been introduced. See ACLU, "Anti-LGBT Religious Exemption Legislation across the Country," ACLU, accessed April 16, 2016, https://www.aclu.org/anti-lgbt-religious-exemption-legislation-across-country?redirect=lgbt-rights/anti-lgbt-religious-refusals-legislation-across-country.

[17] Bobby Jindal, "Bobby Jindal: I'm Holding Firm Against Gay Marriage," *The New York Times*, April 23, 2015, accessed April 23, 2016, http://www.nytimes.com/2015/04/23/opinion/bobby-jindal-im-holding-firm-against-gay-marriage.html?_r=0.

discrimination laws or the fundamental right to marry. While religious exemptions have been given in the past for military service, swearing oaths, school attendance, and alcohol use, those were for minorities, and exemptions on a large scale were limited to religious organizations or places of worship.[18]

This argument requires religious liberty to trump the state's compelling interest in rooting out discrimination. While the courts in cases the discussed above rejected these claims, the fact that the defendants are making them at all is remarkable, particularly since no state has ever exempted commercial business owners or government employees from the obligation to provide services for interracial marriage, interfaith marriage, or marriage involving divorced individuals even though major religious traditions in America have opposed them.[19] This fact undermines any argument that commercial business owners should be exempt from anti-discrimination laws.[20]

Interestingly, during the Civil Rights Movement the demand for religious exemptions from anti-discrimination laws was scarce, and the objections that were voiced were not taken seriously.[21] While some religious exemptions did exist in the Civil Rights Act of 1964, they did

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[18] For example, during prohibition, the Catholic Church was still able to use wine. Also see Mark David Hall, "Religious Accommodations and the Common Good," The Heritage Foundation, last modified October 26, 2015, accessed October 30, 2015, http://www.heritage.org/research/reports/2015/10/religious-accommodations-and-the-common-good.

[19] As Oleske notes, even though many Americans had religious objections to interracial marriage in the 1960s, federal and state anti-discrimination laws never included exemptions allowing business owners to deny services based on those beliefs. Additionally, although the New Testament quotes Jesus condemning divorce and remarriage as against the Ten Commandments, state laws prohibiting discrimination based on marital status do not contain exemptions allowing commercial businesses or individuals with "sincerely held religious beliefs" to refuse to facilitate the remarriages of divorced people. Oleske, "The Evolution of Accommodation," 144 footnotes 230-235.

[20] Ibid., 146

[21] Newman v. Piggie Park Enterprises 390 US 400, 402 n5 (1968) (The Supreme Court rejected as "patently frivolous" a restaurant owner's argument that, by prohibiting racial discrimination, the 1964 Civil Rights Act "constitute[d] an interference with the free exercise of the Defendant's religion" (internal citation and quotation marks omitted)). The lower court opinion explicitly addressed this argument stating: "undoubtedly defendant Bessinger has a constitutional right to espouse the religious beliefs of his own choosing, however, *he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens.* This court refuses to lend credence or support to his position that he has a constitutional right to refuse to

not go beyond protecting the right of churches and other places of worship to hire ministers and other officials of their faith.[22] Additionally, while exemptions have been given in the past, it was generally understood that including broad exemptions for religiously or morally motivated individuals during the civil rights era would have made the laws less effective and would have changed the message sent by the laws:[23]

> The message sent by allowing religious exemptions [in the commercial realm] is that discrimination is wrong and illegal except when it is right and legal. It is illegal and wrong unless your deeply held religious beliefs support [it]. . . The right to discriminate can convey a message that it is right to do so.[24]

While these principles have generally been understood as reasonable in states that have anti-discrimination laws, today the religious right seeks broad exemptions from anti-discrimination laws that apply to any individual or group that has a sincerely held religious belief about LGBT persons or same-sex marriage. While religious freedom has always been an important tenet of American society, it has also always been understood to have its limits. However, currently the arguments for exemptions in the name of religious liberty are unlimited, and religious liberty is seen as a trump card by those who seek exemptions for private business owners and government officials. Of course there is no doubt that their religious beliefs are sincere, or deeply held, but, as the courts in the cases described above recognized, there would be immense harm to individuals and society if exemptions for such individuals from anti-discrimination laws were allowed.

In cases of civil servants such as clerks and magistrates, exemptions should not be granted to them because they are agents of the government and have a responsibility to enforce

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serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs." See Newman v. Piggie Park Enterprises 256 F.Supp 941, 945 (1966) emphasis added.
[22] Curtis, "A Unique Religious Exemption," 179-180.
[23] Ibid., 176
[24] Ibid., 203.

and apply the laws equally. In cases of business owners who provide goods and services, they should not be granted exemptions because there is immense harm that arises when businesses open to the public deny services in such a way that discriminates, even if their objection is rooted in faith. Additionally, the harm to the individual and to society as a whole is not minimized simply because the individual can go somewhere else for the same service.[25]

While it is true that determining the standard of review for sexual orientation was not *necessary* to win those three cases before or after *Obergefell,* determining the standard of review would have helped. For one, even though the Fourteenth Amendment applies to state rather than private actors, in setting a clear standard, governments could argue there is a compelling state interest to root out discrimination in the private sector. Additionally, the Supreme Court has determined that laws have an improper purpose when they accommodate private prejudice.[26] Furthermore, determining the standard would make laws that place homosexuals, or same-sex couples, in a disfavored class because of their sexual orientation harder to defend. While there is a compelling interest in protecting the religious liberty of all people, there is also a compelling interest to not have that freedom interfere with other people's freedom and civil liberties.[27] However, without a clear standard of review, the Court in *Obergefell* gave deference to the states to decide, which also gave states a freer hand to discriminate on the basis of sexual orientation.

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[25] Louise Melling et al., *Drawing the Line: Tackling Tensions Between Religious Freedom and Equality*, 22-23, September 2015, accessed April 25, 2016, https://www.aclu.org/sites/default/files/field_document/inc15-report-drawingtheline-rel1.pdf.

[26] For example in City of Cleburne v. Cleburne Living Center, the Court held the government "may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic. 'Private biases may be outside the reach of the law, but the law cannot directly or indirectly, give them effect.'" 473 U.S. 432, 446-47 (1983) quoting Palmore v. Sidoti, 446 U.S. 429, 433 (1984). However, by selectively accommodating commercial discrimination against same-sex couples that was not previously permitted against other disfavored couples, the proposed exemptions would give private objections validation. See Oleske 145

[27] Michael Nava and Robert Dawidoff, *Created Equal: Why Gay Rights Matter to America* (New York: St. Martin's Press, 1994), 88.

Therefore, determining whether there is a compelling state interest to root out discrimination will likely turn on state court interpretations of state law.

At the state level after *Obergefell,* attorney generals, governors, clerks, judges and senators across the country decried the decision as a blatant judicial overstep and some even vowed to have the decision overturned with a constitutional amendment.[28] While there were varying degrees of the ferocity of responses, several conservative legislatures declared they would act tirelessly to ensure that religious observers would not have to act in any way that conflicted with their conscience. In the months preceding *Obergefell* and immediately following the decision, dozens of bills have been introduced in thirty-one states to protect persons whose religious convictions prevent them from serving the LGBT community in one way or another.[29] Of those 31 states, eleven have existing RFRA laws and of those eleven, four have existing anti-discrimination laws covering sexual orientation.[30]

[28] In Kentucky, 60 clerks signed a petition to the Governor saying they objected to the ruling on religious grounds, however, most decided to issue licenses in fear of losing their jobs. In Alabama, probate judges in 13 of the 67 counties refused to issue marriage licenses at all, and one Judge in Washington County called for a "landmark ruling" to defy the Supreme Court. See Sheryl Gay Stolberg, "Kentucky Clerk Defies Court on Marriage Licenses for Gay Couples," *The New York Times*, August 13, 2013, accessed October 26, 2015, http://www.nytimes.com/2015/08/14/us/kentucky-rowan-county-same-sex-marriage-licenses-kim-davis.html; Andrew Rosenthal, "The Instant Republican Backlash on Gay Marriage," *The New York Times*, June 26, 2015, The Opinionator, http://takingnote.blogs.nytimes.com/2015/06/26/the-instant-republican-backlash-on-gay-marriage/.

[29] See ACLU, "Anti-LGBT Religious Exemption Legislation across the Country," ACLU, accessed April 16, 2016, https://www.aclu.org/anti-lgbt-religious-exemption-legislation-across-country?redirect=lgbt-rights/anti-lgbt-religious-refusals-legislation-across-country.

[30] Existing RFRA laws: Alabama, Kentucky, Mississippi, Missouri, North Carolina, Ohio, Virginia, Maine, Minnesota, New Jersey, New Mexico. RFRA and Non-discrimination laws: Maine, Minnesota, New Jersey, New Mexico.

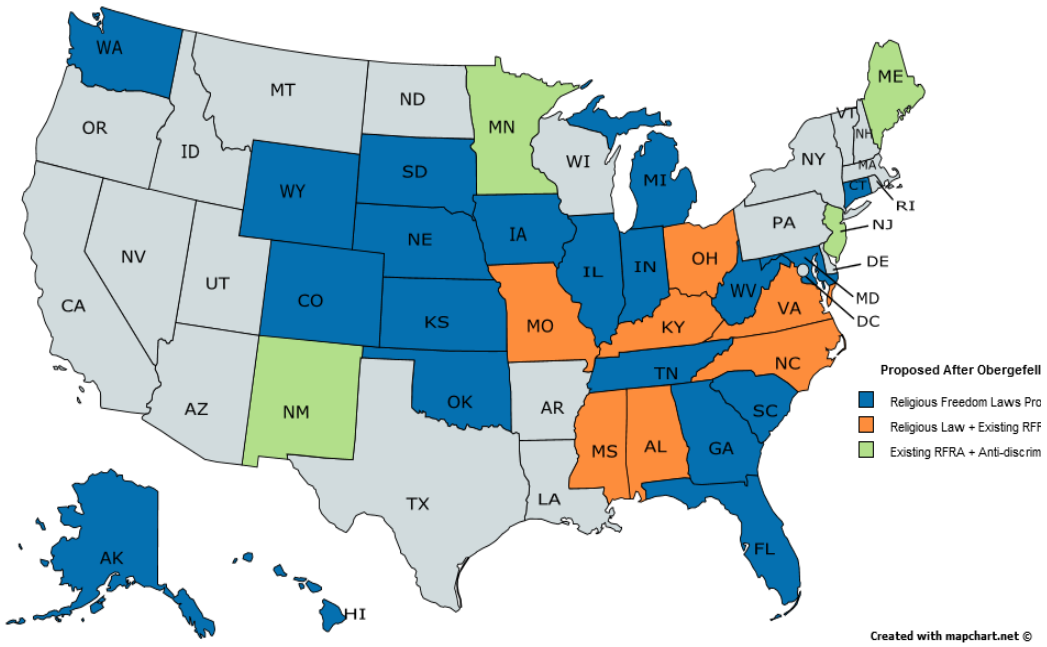

Figure 2. States that Introduced Religious Exemption Bills during 2015 or 2016.[31]

One of the most far reaching of these bills was passed in North Carolina.[32] Known as HB2, the bill was drafted by Republican lawmakers in response to the passage of a Charlotte ordinance that expanded anti-discrimination laws to cover sexual orientation and gender identity, and allowed transgender persons to use public restrooms that aligned with their gender identity.[33] HB2 overrides Charlotte's ordinance, forces people to use bathrooms that match their birth gender, prohibits any local governments from passing anti-discrimination laws to protect LGBT

[31] Colored states indicates states where bills were introduced. Orange indicates states with existing RFRA laws, Green indicates states with existing RFRA laws and existing anti-discrimination laws.

[32] Public Facilities Privacy & Security Act, N.C. Gen. Stat. §§ G.S. 115C, 143-81, 95-25, 153A, 160A (2016). In May 2015, the legislature also passed a bill SB2 that allows state court officials to refuse to perform a marriage if they have a "sincerely held religious objection," to it. The law is not limited to same-sex marriage -- a magistrate could also refuse to perform an interracial or interfaith wedding. Governor McCrory vetoed the bill stating "no public official who voluntarily swears to support and defend the Constitution and to discharge all duties of their office should be exempt from upholding that oath." The GOP controlled state Senate overrode his veto on June 1, 2015. Jonathan Katz, "North Carolina Allows Officials to Refuse to Perform Gay Marriages," *New York Times*, June 11, 2015, accessed April 16, 2016, http://www.nytimes.com/2015/06/12/us/north-carolina-allows-officials-to-refuse-to-perform-gay-marriages.html?_r=0.

[33] The legislature introduced and HB2 in a matter of hours, and the Governor signed it the same day. Mark Berman, "PayPal Abandons Plans to Open Facility in Charlotte Because of LGBT Law," *The Washington Post*, April 5, 2016, accessed April 16, 2016, https://www.washingtonpost.com/news/post-nation/wp/2016/04/05/paypal-abandons-plans-to-open-facility-in-charlotte-due-to-lgbt-law/. Steve Harrison, "Charlotte City Council Approves LGBT Protections in 7-4 Vote," *The Charlotte Oberver* (Charlotte, NC), February 22, 2016, accessed April 16, 2016, http://www.charlotteobserver.com/news/politics-government/article61786967.html.

persons, and prevents individuals from suing for discrimination in state court.[34] While the bathroom aspect of the bill has garnered the most attention from opponents of HB2 and the press,[35] the most extreme aspect of the North Carolina law is the provision blocking the passage or enactment of any local laws that seek to protect the LGBT community. This provision is strikingly similar to Colorado's Amendment 2 deemed unconstitutional in *Romer v. Evans*. In response, the ACLU has challenged HB2 and sued in a district court in North Carolina.[36] While to some the bill is unconstitutional on its face and cannot even pass the rational basis test, it is uncertain how the case will be decided. However, had the standard of review been determined in *Obergefell,* North Carolina would have a difficult time convincing the court that the bill can withstand heightened scrutiny.

While North Carolina's law has been in the spotlight since Governor McCrory signed it, it is not a novel piece of legislation. Similar bills were also passed in Georgia and South Dakota and the Governors in both states vetoed the legislation after immense pressure from the business community and civil rights groups in those states.[37] Additionally, Mississippi passed a similar law that goes further than Georgia's *and* North Carolina's. The law prevents the government from "discriminating"[38] against a "person"[39] for acting on their religious convictions regarding

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[34] Public Facilities Privacy & Security Act, N.C. Gen. Stat. §§ G.S. 115C, 143-81, 95-25, 153A, 160A (2016).
[35] Interestingly, just 10 days after HB2 was signed, the members in North Carolina's House and Senate introduced versions of a bill that would do just that. While both measures have been sent to committee, the state legislature does not reconvene until weeks later. See ACLU, "LGBT Nondiscrimination and Anti-LGBT Bills across the Country," ACLU, accessed April 16, 2016, https://www.aclu.org/lgbt-nondiscrimination-and-anti-lgbt-bills-across-country#affirmnondisc.
[36] Complaint for Declaratory and Injunctive Relief, Joaquín Carcaño et al., v. Patrick McCrory et al No. 1:16-cv-236 (2016).
[37] Alan Blinder and Richard Perez-Pena, "Georgia Governor Rejects Bill Shielding Critics of Gay Marriage," *The New York Times*, March 28, 2016, accessed April 16, 2016, http://nyti.ms/22UcDMp.; Ralph Ellis and Emanuella Grinberg, "Georgia Gov. Nathan Deal to Veto 'Religious Liberty' Bill," CNN, last modified March 28, 2016, accessed April 16, 2016, http://www.cnn.com/2016/03/28/us/georgia-north-carolina-lgbt-bills/index.html; Stern, "Mississippi Governor Signs LGBTQ," *Outward: Extending the LGBTQ Conversation* (blog).
[38] H.B 1523 §4(a)-(g) 2016 Reg. Sess. (Ms. 2016).
[39] H.B 1523 §9.3(a)-(d) 2016 Reg. Sess. (Ms. 2016). Defines person as (a) an individual; (b) religious organization; (c) closely held company, sole proprietorship, partnership, association, organization, firm, corporation, trust, society,

sexuality and marriage.[40] Under the law, the government cannot, for example, prevent businesses from firing a transgender employee, clerks from refusing to issue a marriage license to a same-sex couple, or landlords from refusing to rent to an LGBT person.[41] Additionally, persons and companies that provide marriage-related services like venue owners, photographers, bakers and florists are sheltered from being prosecuted for discriminating.[42]

While North Carolina's bill is being challenged in court, had Kennedy determined the standard of review, it would be harder for the state and other states that pass similar laws to prove exemptions for public and private actors from anti-discrimination laws are substantially related to the compelling interest of protecting religious liberty. In other words, had Kennedy given a clear standard, it would be used as a tool by which civil rights groups could address the strength of the Equal Protection Clause argument made by challengers to the anti-discrimination laws. While it is undeniable that the First Amendment protects the right to believe that homosexuality and same-sex marriage are sins, never before have religious exemptions been validated as means to discriminate or harm other people by denying government services or public accommodations of various kinds.

Both Mississippi and North Carolina have paid a price for passing such laws that are so far reaching into the private commercial realm. For example, in North Carolina, businesses like

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or other closely held entity; or (d) cooperatives, ventures, or enterprises comprised or two or more individuals or entities.

[40] H.B 1523 §2 (a)-(c) 2016 Reg. Sess. (Ms. 2016). The sincerely held religious beliefs or moral convictions protected by this act are the belief or conviction that: (a) marriage is or should be recognized as a unions of one man and one woman; (b) sexual relations are properly reserved to such a marriage; and (c) Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at the time of birth.

[41] Sarah Kaplan, "Mississippi's Senate Just Approved a Sweeping 'Religious Liberty' Bill the Critics Say Is the Worst yet for LGBT Rights," *The Washington Post*, March 31, 2016, accessed April 16, 2016, https://www.washingtonpost.com/news/morning-mix/wp/2016/03/31/mississippis-senate-just-approved-a-sweeping-religious-liberty-bill-that-critics-say-is-the-worst-yet-for-lgbt-rights/.; Stern, "Mississippi Governor Signs LGBTQ," *Outward: Extending the LGBTQ Conversation* (blog).

[42] Furthermore, the bill allows doctors to refuse to provide counseling, sex-reassignment surgery, fertility treatments, and other services and allows companies and schools to establish sex-specific policies regarding dress and bathroom use. See ibid.,

PayPal and Deutsche Bank backed out of multimillion dollar investments that would have brought thousands of jobs to the state.[43] Additionally, the Governor of New York and Mayor of DC have issued official travel bans to North Carolina.[44] The law also garnered international attention when the British government issued a travel warning for its citizens telling them to avoid North Carolina and Mississippi if they identify as a member of the LGBT community.[45] Given the fervent animosity towards the law, the Governor issued an executive order to alter the equal employment policy for state workers to cover discrimination claims related to sexual orientation and gender identity.[46]

Pressure from the business community may ultimately force states that pass these laws to abandon them because they are not economically viable. However, even with corporate pressure, without a clear standard of review, gays and lesbians will continue to be denied equal protection under the law, and then will have to go back to court for every issue that they encounter. Additionally, lower courts have no guidance and have to rely heavily on state laws and interpret them on a case-by-case basis.

Historically, the Court's failure to declare sexual orientation a suspect or semi-suspect classification in *Romer* and *Lawrence* resulted in concrete harm to gays and lesbians because lower courts had, until recently, determined that laws barring homosexuals from openly serving in the military and laws prohibiting gays and lesbians from adopting, passed the rational basis test. Determining the standard of review would not have stopped unfair treatment in every

[43] Berman, "PayPal Abandons Plans to Open."
[44] Richard Fausset and Alan Blinder, "North Carolina Governor Tries to Step Back from Bias Law," *The New York Times*, April 12, 2016, accessed April 16, 2016, http://www.nytimes.com/2016/04/13/us/north-carolina-governor-pat-mccrory.html
[45] Laura Wagner, "Obama: North Carolina's Bathroom Law 'Should Be Overturned,'" NPR, last modified April 22, 2016, accessed April 23, 2016, http://www.npr.org/sections/thetwo-way/2016/04/22/475295225/obama-north-carolinas-bathroom-law-should-be-overturned.
[46] Richard Fausset and Alan Blinder, "North Carolina Governor Tries."

situation, but it would have made it much harder for public and private actors to treat homosexuals as second class citizens in those cases and the same is true post-*Obergefell*.

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Eventually the Court will determine the standard of review for sexual orientation. Justice Kennedy may no longer be on the Court when the standard is determined, but given that homosexuals have been subject to a history of discrimination; they exhibit an obvious, immutable, or distinguishing characteristic; and they are a minority with less political power than non-suspect classes, it is undeniably clear that gays and lesbians meet the criteria to be considered a semi-suspect class. As shown throughout this thesis, failing to determine the standard of review for gays and lesbians almost guarantees present and future harm. When the Court does determine the standard**,** lower courts will have binding precedent to apply to laws that place members of the LGBT community in a disfavored class, and government officials at all levels may be deterred from passing such laws knowing they will be unlikely to survive. Additionally, determining the standard will also make it more difficult for private actors seeking exemptions from generally applicable laws to discriminate against the LGBT community in the name of religious liberty.

While it is uncertain how long it will take the Court to determine the standard of review, there are steps that can be taken in the meantime to protect homosexuals and other members of the LGBT community. For one, the federal government can amend existing anti-discrimination laws or pass new laws covering sexual orientation and gender identity. Currently there is not a comprehensive federal law that bans discrimination on the basis of sexual orientation or gender identity in credit, education, employment, federal funding, housing, jury service, and public

accommodations.[47] The absence of federal protections from discrimination means that homosexuals and other LGBT persons are more susceptible to discrimination and are largely powerless to combat such discrimination in many cases.[48] Therefore, even though same-sex couples around the country have the right to marry after *Obergefell*, they still have no federal protections against being denied a loan for buying a home,[49] being fired from their job,[50] or being told they cannot be served in a restaurant.

The current lack of federal anti-discrimination laws barring discrimination based on sexual orientation has meant that many states and municipalities have been responsible for protecting, or not protecting, the LGBT community from discrimination. While some states have expanded existing anti-discrimination laws to protect LGBT persons, others have not. This inconsistency creates a patchwork of protections and uncertainty among homosexuals and the LGBT community as a whole.

Currently in the United States, 28 states have no laws prohibiting discrimination on the basis of sexual orientation, and 31 states lack explicit gender identity nondiscrimination protections.[51] Within these states, some cities and counties have passed their own anti-

[47] While anti-discrimination laws in each of this areas exist at the federal level, they are limited to barring discrimination on the basis of race, color, religion, national origin, sex, marital status, age, or other categories. See Human Rights Campaign, *Beyond Marriage Equality: A Blueprint*. 15 (credit); 21-22 (education); 30 (employment); 39 (federal funding); 45 (housing); 51 (jury service); 57 (public accommodations).

[48] For example, under current laws private hospitals that receive federal funding through programs such as Medicaid and Medicare may discriminate against LGBT doctors, nurses, support staff or patients on the basis of their sexual orientation or gender identity. Ibid., 39

[49] Ibid., 15.

[50] For example, in 2010 Katrina Martir was fired from her job as a fourth grade science teacher at a public school in Kentucky when she told her principal she planned to get pregnant via artificial insemination and raise and child with her partner. Martir went to see a lawyer to sue for employment discrimination but was told there was nothing illegal in her being fired and there was nothing that could be done. See Timothy M. Phelps, "Next Frontier for Gays Is Employment and Housing Discrimination," *LA Times*, June 26, 2015, accessed April 15, 2016, http://touch.latimes.com/#section/-1/article/p2p-83869739/.

[51] Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, Wyoming

discrimination laws covering sexual orientation, gender identity, or a combination of both.[52] Additionally, some Governors have issued executive orders prohibiting discrimination based on sexual orientation or gender identity in various states.[53] However, these orders are frequently limited to state employees, and the protections can be rescinded by future Governors.

In contrast, 23 states and the District of Columbia have enacted anti-discrimination laws that bar discrimination on the basis of sexual orientation or gender identity.[54] Even within these states, however, the protections are inconsistent, as some laws only include sexual orientation, and not gender identity.[55] Homosexual, bisexual, or transgender persons in America who lack protections against discrimination at the federal *and* state level, are subject to the personal views or biases of potential employers, lenders, merchants, or real estate agents. If the federal government was to amend existing anti-discrimination laws to cover sexual orientation and gender identity, then it would offer protections for LGBT persons in 28 states without any anti-discrimination laws. Additionally, should the federal government amend existing or pass new laws, then the state governments would have to enforce the federal laws.

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[52] Oleske, "The Evolution of Accommodation," 136.; Human Rights Campaign, *Beyond Marriage Equality: A Blueprint*.

[53] The Governors of Indiana, Kansas, Kentucky, Michigan, North Carolina, Pennsylvania, New York, and Virginia have all issued an executive order, administrative order, or personnel regulation banning discrimination against public employees due to their sexual orientation or gender identity. In Alaska, Arizona, Missouri, Montana, and Ohio, public employees are protected through an executive order from discrimination based on their sexual orientation only. Human Rights Campaign, *Beyond Marriage Equality: A Blueprint*, 31.

[54] California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, Washington, Wisconsin. As of April 24, 2016.

[55] For example, Massachusetts' nondiscrimination laws bar discrimination on the basis of sexual orientation and gender identity in employment, housing, and credit, but the laws only cover sexual orientation for public accommodations. Additionally, California, Delaware, DC, Hawaii, Nevada, and Oregon all have anti-discrimination laws covering sexual orientation and gender identity in employment, housing, and public accommodations, but have no protections against discrimination for either group in credit. See Human Rights Campaign, *Beyond Marriage Equality: A Blueprint* and "Non-discrimination Laws," table, Movement Advancement Project, October 28, 2015, accessed October 31, 2015, http://www.lgbtmap.org/equality-maps/non_discrimination_laws.

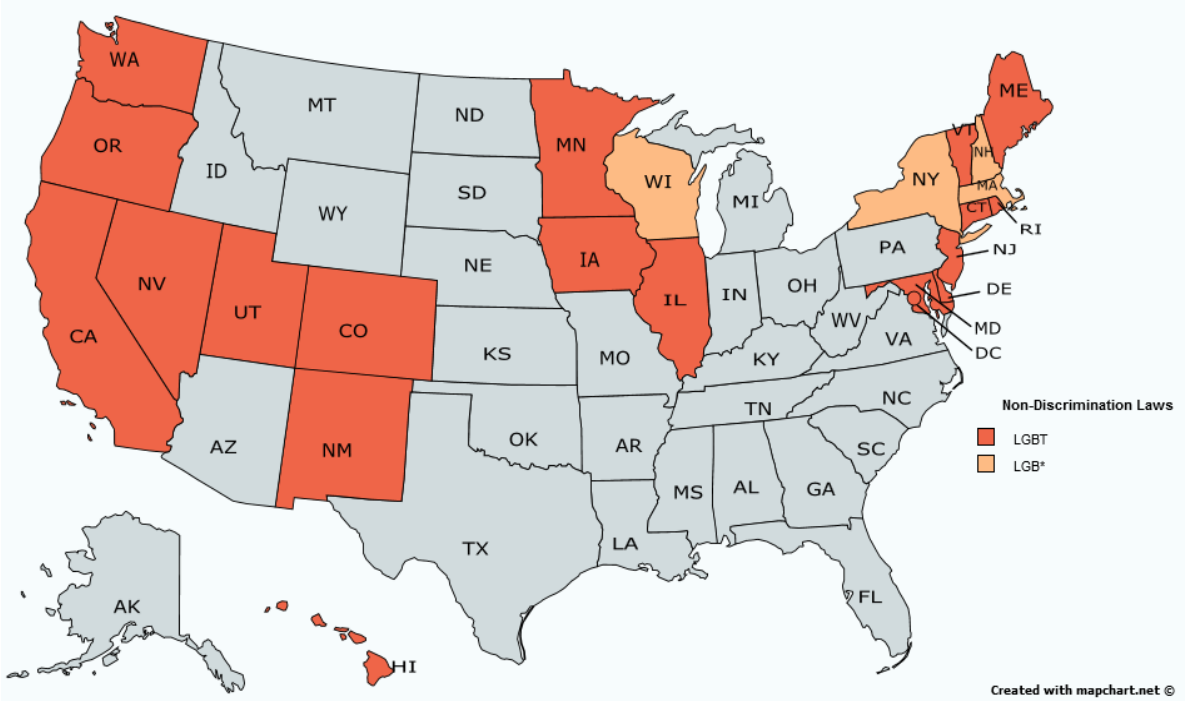

Figure 3. Statewide Anti-discrimination Laws Protecting on the Basis of Sexual Orientation (LGB*) or Sexual Orientation and Gender Identity (LGBT).[56]

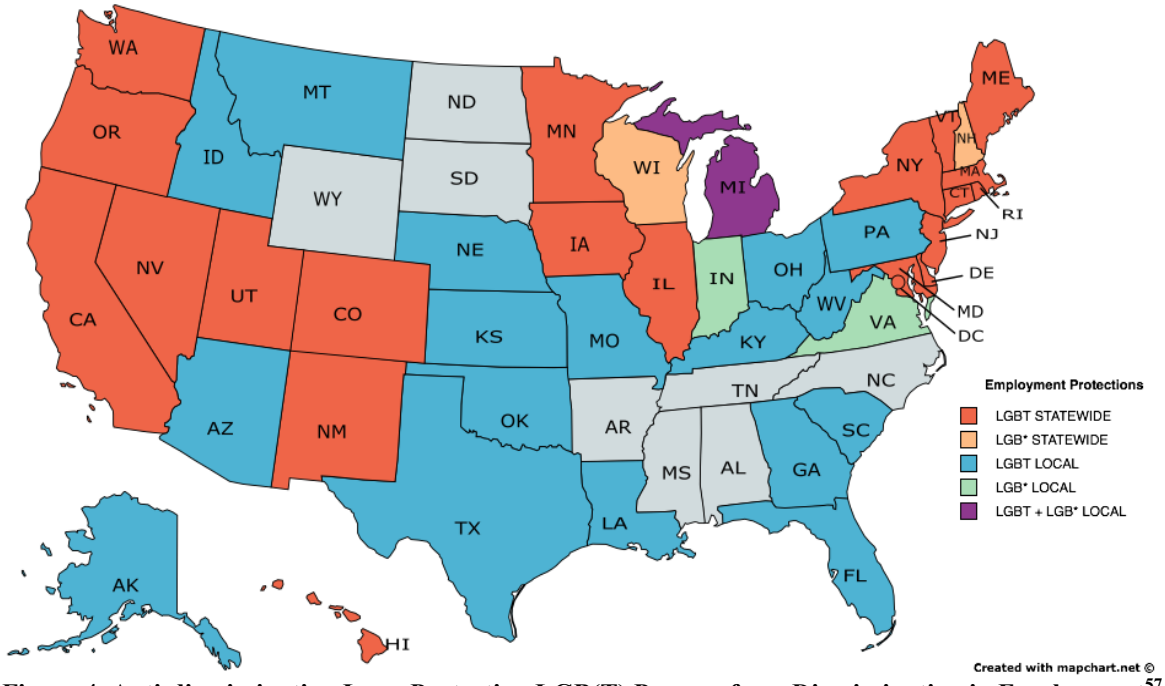

Figure 4. Anti-discrimination Laws Protecting LGB(T) Persons from Discrimination in Employment[57]

[56] This map reflects states that have anti-discrimination laws in employment. Some of the states included do not cover housing, credit, or public accommodations. Those that cover more than employment may cover just sexual orientation in some areas, but cover sexual orientation and gender identity in others.

Following the *Obergefell* decision in 2015, Rep. David Cicilline (D-RI) in the House and Senator Jeff Merkley reintroduced the Equality Act[58] which would amend the Civil Rights Act of 1964 to add sexual orientation *and* gender identity to the list of already protected classes.[59] Additionally the law included a provision to add sex as a class that is protected from discrimination in public accommodations, since that is not currently included, and the law would widen the definition of a public accommodation.[60] While the bill has overwhelming Democratic support, the bill is unlikely to pass before the November elections. Therefore, it is unclear if the protections will come before the standard of review; however, if the standard comes first, the federal protections will likely follow.

That is not to say that declaring the standard of review would solve all of the problems the LGBT community faces in America and discrimination on the basis of sexual orientation and gender identity would vanish. If determining the standard of review was an antidote for discrimination, then racism and sexism would no longer exist. Scrutiny does not operate as a silver bullet to create a utopian society where no one is ever denied their civil rights. Nevertheless, a higher level of scrutiny allows anti-discrimination laws to ultimately be enforced.

Justice Kennedy's gay rights jurisprudence on the Supreme Court has changed the trajectory of the Gay Rights Movement and helped solidify the progress homosexuals have made

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[57] Map does not show the patchwork of laws for discrimination laws in other areas such as housing, public accommodations, and credit.

[58] The Equality Act, H.R. 3185, 114th Cong., 1st Sess. (2015). Accessed October 30, 2015. http://www.gpo.gov/fdsys/pkg/BILLS-114hr3185ih/pdf/BILLS-114hr3185ih.pdf. The Equality Act of 1974 was introduced by Representatives Bella Abzug (D-NY) and Ed Koch (D-NY). The act would have amended the Civil Rights Act of 1964 to ban discrimination on the basis of sex, marital status, and sexual orientation in employment, public accommodations, public facilities, education, housing, and federally assisted programs. Also see Human Rights Campaign, *Beyond Marriage Equality: A Blueprint* 36.

[59] Amanda Terkel, "Here's the Next Major Fight for the LGBT Community," The Huffington Post, last modified July 23, 2015, accessed April 23, 2016, http://www.huffingtonpost.com/entry/equality-act_us_55afe880e4b08f57d5d35de7.

[60] As of now, the list reflects the 1964 definition specifying the "lunch counter" and "soda fountain." The new bill would broaden the categories to reflect modern times and cover almost every entity that provides goods, services, or programs. Ibid.,

in achieving justice and equality under the law. From the time of his *Beller* opinion on the Ninth Circuit to *Romer, Lawrence, Windsor,* and finally with *Obergefell,* Justice Kennedy developed the language for the Court to talk about homosexuals as human beings, and afford them the equal dignity they deserve. While there are obvious reasons to celebrate the *Obergefell* decision, for some the opinion produced a pang of uncertainty and disappointment. Despite homosexuals meeting all the requirements to be considered a suspect or semi-suspect class, and having four instrumental class based victories in the Supreme Court over the last two decades, Kennedy in *Obergefell* chose not to determine the standard of review. While Justice Kennedy has single handedly enlarged the scope of legal protections for homosexuals, his failure to take the next step and provide them with the status of a protected class means that there is still more work to be done.

Appendix

Table 1. Legalization of Same-Sex Marriage in America

State	Ban	Civil Unions?	When?	Date of ssm Legalization	Overturned with Obergefell?	Constitutional Ban	Date:	Statutory ban	Date:	Legalized via Legislation	Ban overturned with court ruling	Court	Date
Alabama	1	0	-	6/26/15	1	1	2006	1	1998	0	1	Supreme Court	6/26/15
Alaska	1	0	-	10/12/14	0	1	1998	1	1996	0	1	Ninth Circuit	10/7/14
Arizona	1	0	-	10/17/14	0	1	2008	1	1995	0	1	Ninth Circuit	10/7/14
Arkansas	1	0	-	6/26/15	1	1	2004	1	1997	0	1	Supreme Court	6/26/15
California	1	1	2000	6/26/13	0	1	2008	1	1995	0	1	Supreme Court	6/26/13
Colorado	1	1	2013	10/6/14	0	1	2006	1	2000	0	1	Tenth Circuit	10/6/14
Connecticut	1	1	2005	10/10/08	0	0	-	1	2005	0	1	Connecticut Supreme Court	10/10/08
Delaware	0	1	2011	7/1/13	0	0	-	0	-	1	0	-	-
District of Columbia	0	1	1992	3/3/10	0	0	-	0	-	1	0	-	-
Florida	1	0	-	1/6/15	1	1	2008	0	-	0	1	Florida District Court	8/21/14
Georgia	1	0	-	6/26/15	1	1	2004	0	-	0	1	Supreme Court	6/26/13
Hawaii	1	1	2011	12/2/13	0	1	1998	0	-	1	0	-	-
Idaho	1	0	-	10/15/14	0	1	2006	0	-	0	1	Ninth Circuit	10/7/14
Illinois	1	1	2011	6/1/14	0	0	-	1	1996	1	0	-	
Indiana	1	0	-	10/6/14	0	0	-	1	1986	0	1	Seventh Circuit	10/7/14
Iowa	1	0	-	4/27/09	0	0	-	1	1998	0	1	Iowa Supreme Court	4/3/09
Kansas	1	0	-	10/6/14	0	1	2005	1	1996	0	1	Tenth Circuit	10/6/14
Kentucky	1	0	-	6/26/15	1	1	2004	1	1998	0	1	Supreme Court	6/26/15
Louisiana	1	0	-	6/26/15	1	1	2004	1	1988	0	1	Supreme Court	6/26/15
Maine	1	1	2005	12/29/12	0	0	-	1	1997	1	0	-	
Maryland	1	1	2008	1/1/13	0	0	-	1	1973	1	0	-	-
Massachusetts	0	0	-	5/17/04	0	0	-	0	-	0	1	Massachusetts Supreme Court	
Michigan	1	0	-	6/26/15	1	1	2004	1	1995	0	1	Supreme Court	6/26/13
Minnesota	1	0	-	8/1/13	0	0	-	1	1997	1	0	-	-
Mississippi	1	0	-	6/26/15	1	1	2004	1	1997	0	1	Supreme Court	6/26/15
Missouri	1	0	-	6/26/15	1	1	2004	1	1996	0	1	Supreme Court	6/26/15
Montana	1	0	-	11/19/15	0	1	2004	1	1997	0	1	Ninth Circuit	10/7/14
Nebraska	1	0	-	6/26/15	1	1	2000	0	-	0	1	Supreme Court	6/26/15
Nevada	1	1	2009	10/9/14	0	1	2002	0	-	0*	1	Ninth Circuit	10/7/14
New Hampshire	1	1	2007	1/1/10	0	0	-	1	1987	1	0	-	-
New Jersey	0	1	2007	10/31/13	0	0	-	0	-	0	1	Mercer County Superior Court	9/27/13
New Mexico	0	0	-	12/19/13	0	0	-	0	-	0	1	New Mexico Supreme Court	12/19/13
New York	0	0	-	7/24/11	0	0	-	0	-	1	0	-	-
North Carolina	1	0	-	10/13/14	0	0	-	1	1996	0	1	Fourth Circuit	10/13/14
North Dakota	1	0	-	6/26/15	1	1	2004	0	-	0	1	Supreme Court	6/26/15
Ohio	1	0	-	6/26/16	1	1	2004	1	2004	0	1	Supreme Court	6/26/13
Oklahoma	1	0	-	10/6/14	0	1	2004	1	1975	0	1	Tenth Circuit	10/6/14
Oregon	1	0	-	5/19/14	0	1	2004	0	-	0	1	U.S. District Court	5/19/14
Pennsylvania	1	0	-	5/20/14	0	0	-	1	1996	0	1	U.S. District Court	5/20/14
Rhode Island	1	1	2011	8/1/13	0	0	-	0	-	1	0	-	-
South Carolina	1	0	-	11/20/14	0	1	2006	1	1996	0	1	Fourth Circuit	10/6/14
South Dakota	1	0	-	6/26/15	1	1	2006	0	-	0	1	Supreme Court	6/26/15
Tennessee	1	0	-	6/26/15	1	1	2006	1	1996	0	1	Supreme Court	6/26/15
Texas	1	0	-	6/26/15	1	1	2005	1	1997	0	1	Supreme Court	6/26/15
Utah	1	0	-	10/6/14	0	1	2004	1	1977	0	1	Tenth Circuit	10/6/14
Vermont	1	1	2000	9/1/09	0	0	-	0	-	1	0	-	-
Virginia	1	0	-	10/6/14	0	1	2006	1	1975	0	1	Fourth Circuit	10/6/14
Washington	1	1	2007	12/6/12	0	0	-	1	1998	1	0	-	-
West Virginia	1	0	-	10/9/14	0	0	-	1	2000	0	1	Fourth Circuit	10/6/14
Wisconsin	1	1	2009	10/6/14	0	1	2006	0	-	0	1	Seventh Circuit	9/4/14
Wyoming	1	0	-	10/21/14	0	0	-	1	1977	0	1	Tenth Circuit	10/6/14
TOTAL:	45	16			15	30		33		12	39		

Source: Freedom to Marry

*In May 2013 the state legislature voted in favor of a measure that began a multi-year process of amending the Nevada Constitution. Before that process was over, the Ninth Circuit ruled in favor of same-sex marriage

Table 1. Explanation

This table shows the trajectory of same-sex marriage in the 50 United States and the District of Columbia. The column titled “Ban” indicates whether or not a state ever had a ban on same-sex marriage in place (1 indicates yes, 0 indicates no). “Civil unions?” indicates whether or not the state ever enacted civil unions, which, before nationwide marriage equality, offered same-sex couples some benefits of marriage without the official designation. For the 16 states that did enact civil unions, the “When?” column corresponds with the year civil unions were passed and implemented in those states. The “Date of SSM Legalization” represents the date that the court ruling or legislation legalizing same-sex marriage went into effect. For some of the states, same-sex couples were not able to marry until days, weeks, or months after a court ruled on a case or a Governor signed a bill. The “Overturned with Obergefell?” column indicates the states that were affected by the *Obergefell* decision. “Constitutional Ban” indicates states that had constitutional bans on same-sex marriage. Most of these were characterized by constitutional definitions of “marriage” as a union between a man and a woman. The next column demonstrates when the state passed the measure. Normally the constitutional amendments were approved by voter referendum. “Statutory Ban” indicates states that implemented statutory bans barring same-sex marriage, and the subsequent column indicates the date when the measure was passed. The “legalized via legislation” column indicates whether or not same-sex marriage was legalized by the state legislature. The “ban overturned by court ruling” indicates states that had their same-sex marriage ban(s) struck down by a judicial body. The next column indicates which court made the decision and the last column indicates the day the court ruled in favor of same-sex marriage.

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